IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 456

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

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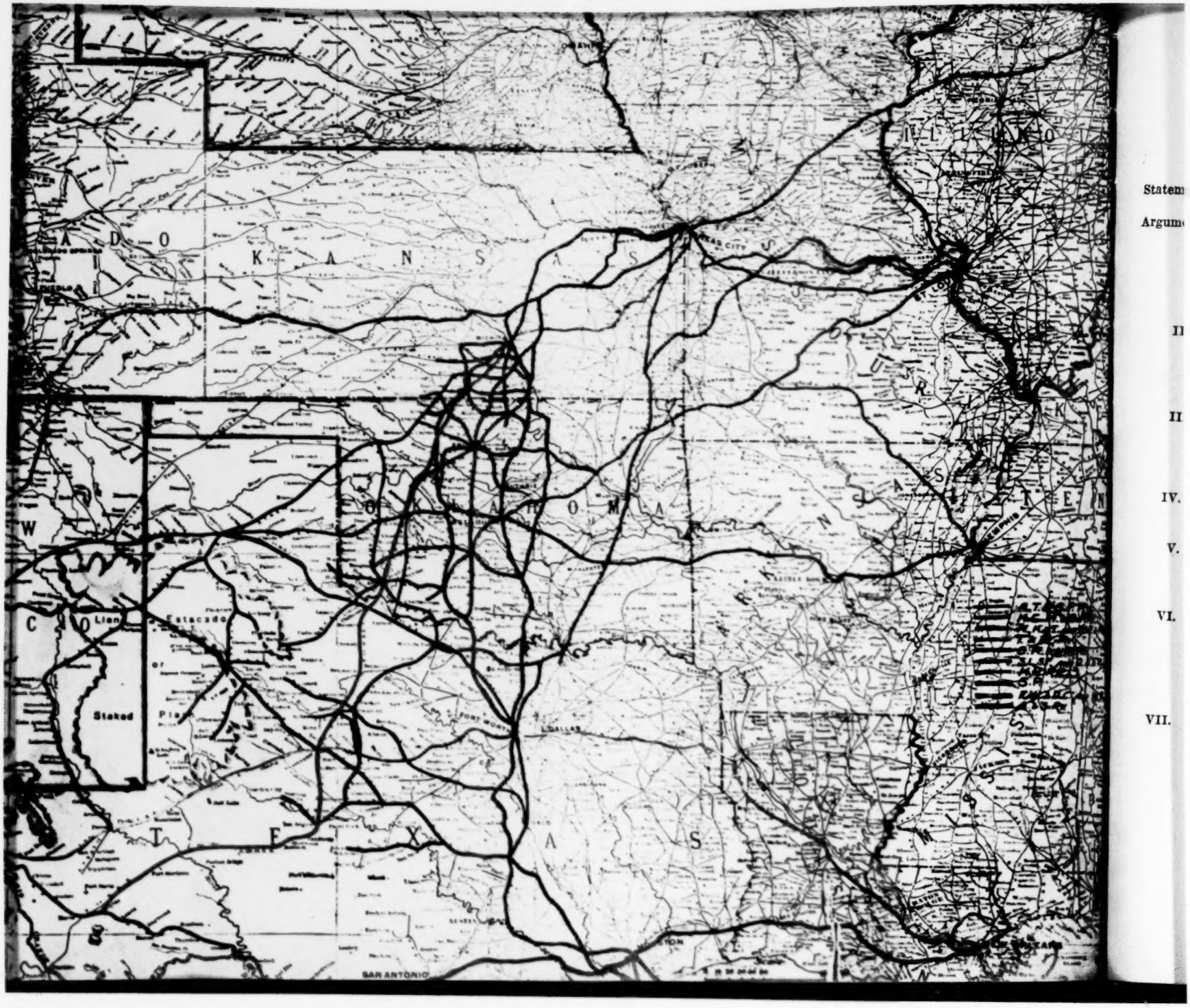

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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

NOTE: As the record made before the Interstate Commerce Commission and the record on appeal in this Court are in separate volumes, reference to the transcript printed in this Court will be indicated by the number of the page with the letters Trans., thus (Trans. 10), while reference to the page of the record of the Interstate Commerce Commission, printed and filed in the Court below, and filed here by stipulation, will be preceded by the letters Com., thus (Com. 15).

In order to secure a just apprehension of this case the Court should at the threshold fix in mind the following weighty matters:

FIRST.

On January 1, 1922, three months before this proceeding was instituted by the Interstate Commerce Commis-

sion, the carrier, which has for brevity been designated in this record as the Orient, suffered through an order of the Interstate Commerce Commission (Com. 163) a reduction of freight revenue from grain and farm products amounting (Com. 77, 267) to $214,800 a year.

While one arm of the government was thus cutting the income of the Orient and its connections, the appellees, another governmental body, the United States Railroad Labor Board, had caused an advance of wages aggregating to the Orient (Com. 272) the burdensome amount of $325,000 per annum.

Between two such regulating forces carriers stronger than the Orient are staggering.

SECOND.

The Orient never can, according to its traffic manager, earn operating expenses in its present geographical situation between Wichita, Kansas, and Alpine, Texas.

The first evidence presented at the hearing before the Commission (Com. 296) was that for the first three months of 1922, following the reduction of rates ordered, as previously mentioned, the Orient suffered a deficit of $224,607.47. It was failing to meet expenses (Com. 135) by about $75,000 per month.

The first testimony offered by the Orient (Com. 78) and its first exhibit (Com. 264) disclose deficits as follows:

1917	$45,854.07
1920	1,470,106.97
1921	806,740.49
First three mo. '22,	$224,067.47

It was shown (Com. 312) by Exhibit 22 that from 1905 down to 1920 the Orient had failed to earn operating expenses in every year except 1903, 1904, 1907 and 1913.

Exhibit 22 shows such operating deficits as follows:

1905	$ 5,570.60
1906	3,119.69
1908	104,324.26
1909	192,303.49
1910	61,514.79
1911	145,117.78
1912	334,095.03
1914	28,516.60
1915	273,513.83
1916	468,952.00
1917	580,144.00
1918	695,246.00
1919	1,223,369.00
1920	1,461,279.00

The foregoing financial history explains better than it could otherwise be done what the traffic manager of the Orient meant by this testimony (Com. 187):

"Examiner Burnside: Mr. Shaufler, I think I can make it plain. Do you think it would be sufficient inducement for the construction of a road to limit it to its present operating mileage?

A. No, sir.

Mr. Wood: And you would not recommend the construction of that sort of property?

A. What sort?

Q. Limited as it is now in its geographical extent.

Mr. Boyd: From Wichita to Alpine.

Mr. Wood: From Wichita to Alpine.

A. No. If the property was to continue there as it is now, it would be impossible to make operating expenses."

The foregoing statement of the freight traffic manager of the Orient was repeated (Com. 217):

"I just said, Mr. Examiner, that I thought Mr. Wood's question was whether we would consider building a railroad from Wichita to Alpine. I said no. Such a line would not be able to pay its operating expenses; but if the line was extended to Kansas City it would then, in my opinion, more than pay its operating expense."

That states the situation of the Orient—the question is of geography and capitalization and not of "just, reasonable, and equitable divisions" under Section 15 (6).

Mr. Shaufler stated (Com. 149) that it would require a 65 per cent increase of revenue from divisions to overcome the deficit estimated by the general manager for that year; and he said that if the Labor Board should award, as he hoped, a reduction of wages amounting to $325,000, he would then need $1,315,000 out of divisions. That is almost as much as the gross revenue of the Orient for any year of its history as shown (Com. 312) in its Exhibit 22.

As the traffic manager said (Com. 217), if the Orient could be extended to Kansas City and there have an opportunity to compete for the traffic distributed by lines ending at the Missouri River, then it might succeed.

While the case was brought by the Orient for better divisions, the record makes it plain that it is in fact a case in which additional capital is sought.

THIRD.

Under Section 1 (18) of the Interstate Commerce Law, requiring a certificate of convenience from the Interstate Commerce Commission before the construction of a new line, the Orient would to-day be denied permission to build.

The line was built (Com. 100) into a cattle country. It was built into a country (Com. 101) where, "on several occasions in Texas all of the cattle would have perished and died on account of drought."

It appeared of record (Com. 188), from the report to the Interstate Commerce Commission by Professor Rip-

ley of Harvard University, regarding plans of consolidation under the Transportation Act, 1920:

> "Its line from Wichita across Oklahoma absolutely parallels an existing line of the Frisco. And from the Red River, forming the northern boundary of Texas, on to Mexico, the Orient road parallels the Texas & Pacific."

It appeared of record (Com. 155, 162) that the Orient is so paralleled that if the Commission were to attempt to relieve it by giving it specially high rates the shippers would drive their cattle or haul their products to competing lines.

That refutes the statement of the Commission (Trans. 14), drawn from a record other than this, that the Orient "is of essential importance in meeting the transportation needs of the public in the territory which it serves."

Exhibit 23, facing page 312, reproduced in the back of this brief, illustrates through what a network of existing lines the Orient was constructed from Wichita to Alpine; and it shows through what a network of competing lines it must construct if it should ever carry out the original plan of reaching (Com. 197) Kansas City.

It was admitted that those routes competing were largely in existence before the Orient was built. The traffic manager said:

> "There has been very little building of railroads since the Orient was constructed."

It appeared also (Com. 172) that this line, constructed among existing and some very strong railways, was intended to reach concessions of valuable timber lands in Mexico. But for want of capital the Mexican section never has been finished. Both ends of the line are missing. Whether the railroad projected would pay if completed, it cannot in its present state be treated as a fin-

ished railroad under "efficient and economical management," in the mind of Congress when it wrote Section 15a (2).

FOURTH.

As it costs the Orient $1.1163 to earn a dollar, its case is hopeless so far as relief from revenue from its connections is concerned. No matter what its income, it would be a loser under such operation. Its Exhibit 20 (Com. 297) shows its operating ratio to be 111.63. That is the ratio of operating expense to gross earnings. A dollar costing $1.1163 is a damage. In such circumstances the Orient must either cease operating or it must take some steps to bring its costs within its income.

A high operating ratio shows that a railroad is inefficiently managed, or that it is rendering more service than the density of its traffic justifies (a matter not inquired into at all by the Interstate Commerce Commission), or that the territory which it serves and the traffic which it can secure does not justify its existence, or that its rates are too low. We believe that all these factors contribute to the condition in which the Orient finds itself. But whatever the cause, a dollar costing $1.1163 is a damage.

FIFTH.

All of the foregoing matters are substantiated by the Orient's life in receivership.

The line from Wichita to Anthony, Kansas, was completed in 1913. Construction was begun at Anthony in 1902. Before the completion of the line a receiver had been appointed. That was on March 7, 1912. The road sold for $6,000,000, the purchasers assuming the receivership's obligations. Then it ran along until April 17, 1917,

when it went into receivership again. (Com. 186.) That receivership has continued ever since.

On July 1, 1920, the Interstate Commerce Commission refused an application of the Orient for a loan of $2,500,000 because it believed that the uses to which the money was to be put (for "clearing title" and building an extension, among others) were not those specified in Section 210 of the Transportation Act. But it expressed the view that a sale "might well prove of benefit to the operation of the property by scaling down the present top-heavy capitalization."

Loan to Kansas City, M. & O. R. R. Co. 65 I. C. C. 36.

However, upon a petition for reconsideration the Commission, on October 11, 1920, authorized the loan of $2,500,000.

Ibid. p. 265.

On February 3, 1921, the Commission supplemented its previous order by permitting the Orient, as long as it should not be in default, to receive and retain the income on any collateral then pledged as security.

Ibid. 67 I. C. C. 23.

On November 26, 1921, the Commission denied an application for an additional loan of $2,500,00, but it granted an extension of time for another year. Commissioner Daniels dissented, saying:

> "For the present and for some indefinite period to come it is certain that this carrier as it stands today cannot earn its operating expenses."

Having shown just what kind of railroad the Orient has been from the beginning, we shall now make an examination of the record upon which the Commission ordered the Orient's connections to take care of it. The order of the Commission was made against appellees subsequently to its loan to the Orient of $2,500,000.

ARGUMENT.

I.

THE RECORD BEFORE THE COMMISSION WAS WITHOUT EVIDENCE TO SUPPORT THE ORDER MADE, AND THE CARRIERS WERE THEREFORE DENIED THAT "FULL HEARING" WHICH CONGRESS GIVES TO THEM BY SECTION 13 (4).

This proposition is practically conceded in the brief for the United States, a considerable part of which is devoted to an argument that the reports of the carriers to the Commission are usable by it in such cases and are binding upon the companies that make them. In support of this contention the brief contains an appendix of many pages carrying extracts from the Interstate Commerce Law regarding reports of carriers and the records of the Commission. Nothing in the record is cited.

But the brief for the Interstate Commerce Commission undertakes to extract from a record entirely unique some "substantial evidence" to justify the Commission's order.

> "Confessedly, from the arguments of counsel and their briefs," said the United States District Court (Trans., 42), "the issue comes down to the inquiry whether or not the necessary facts in support of the Commission's order can be found in the exhibits; otherwise there is no proof on which the order can be rested."
>
> *Abilene, etc.* v. *U. S.* 288 Fed. 102.

We shall first examine the record made by the Commission at the hearing and then give attention to the theory that it supports the order.

The Orient's Application.

The Orient applied to the Interstate Commerce Commission on February 23, 1922, for an order respecting the divisions with its connections of freight revenue earned jointly by it and other carriers.

The application, which was made by the Orient shortly after the expiration of the loan of $2,500,000 previously mentioned, did not complain (Com. 5) that the divisions of joint rates which it was receiving from connections were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" within Section 15 (6) of the Interstate Commerce Law as amended by Section 418 of the Transportation Act of 1920. On the contrary, the application of the Orient called for (Com. 8) help in the routing over its line of freight in which the government of the United States might be interested and which it might therefore control. Secondly, it asked for an appropriate order from the Commission directing the routing of shipments over the Orient which the shippers themselves might not direct. Thirdly (Com. 11), it asked that the Commission make an appropriate order applicable to divisions which would increase "the earnings of roads having small gross earnings per mile" by deduction "from the earnings of the stronger lines" participating in the shipments. In this third proposal the Orient specifically asked that the additional income be given it "after applying the present carriers' divisions." That is, the Orient not only did not attack the existing divisions, as such, but it asked that they be allowed to stand and that earnings in addition thereto be taken for it "from the earnings of the stronger lines" participating in the shipments.

The Orient set up in its application Exhibits A to J inclusive (Com. 16-35) to illustrate how the existing di-

visions of through rates might be readjusted so as to reduce "the earnings of the stronger lines" and increase the earnings of the Orient. Thus, Exhibit A. (Com. 16-17) would cut the share of the earnings of the New York Central on sewing machines from Cleveland to San Francisco from $114.73 to $88.52.

That is illustrative of the plan of the Orient as stated (Com. 11-14) by it in detail in the preceding pages of its application.

The application was accompanied by a brief and argument (Com. 39) in which was shown (Com. 42) a deficit of $806,740 for the year 1921.

The Orient pointed out (Com. 51) that the percentage of increase in rates prescribed by the Interstate Commerce Commission in *Ex Parte* 74 (the case in which an advance of rates by groups was ordered in July, 1920, in pursuance of the direction of Congress in the Transportation Act) was not sufficient to take care of the Orient's operating costs. It said:

> "A rate structure sufficiently high to make the weaker lines self-sustaining would give the stronger lines larger returns than that provided by Congress. The Congress in paragraph 6 of Section 15 gave to the Commission full power to adjust divisions of rates so as to provide the weaker lines with sufficient income to permit continued operation, as a matter of public necessity."

As to the first sentence quoted, it was the intention of Congress, stated in Section 15a, that the rates prescribed by the Commission *should* be so high that the stronger lines in a group might earn more than 5.5 or 6 per cent, one-half of the excess earning to go to roads like the Orient; and it was through Section 15a that carriers situated like the Orient were to receive assistance. Such assistance was to be taken, not from carriers earning less than 5.5 to 6 per cent, like most of appellees here, but from those earning more.

The Orient's Evidence.

On April 3, 1922, the Commission ordered an investigation (Com. 63) as to whether the existing divisions "are unjust, unreasonable, inequitable, or unduly preferential or prejudicial within the meaning of paragraph (6) of Section 15 of the said act." On May 15th the case came on for hearing at Washington (Com. 69) and the record there made is contained from page 69 to page 413 of the transcript printed in the Court below.

At the trial the first evidence offered by counsel for the Orient (Com. 75) was of deficits from year to year. The first exhibit introduced (Com. 264) showed deficits as follows:

1917	$45,854.07
1920	1,470,106.97
1921	806,740.49
1922 (First 3 mo.)	224,067.47

Everything offered for the Orient was of that nature. Nothing was presented to show that existing divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial" to the Orient under Section 15 (6).

Direct and clear evidence of that was a prerequisite to any order by the Commission.

Neither in the written application to the Interstate Commerce Commission, just before reviewed, nor in the evidence presented by the Orient at the hearing, did petitioner make any statement or give any intimation that it believed the existing divisions with its connections were, when judged by the usual standards, in any way "unjust, unreasonable, inequitable, unduly preferential, or prejudicial" under Section 15(6).

It is important to grasp this fact at the outset, for in the District Court and in this Court appellants have

tried to show that there *was* evidence in the record supporting the report and finding of the Commission (Trans., 10), and particularly supporting this (Trans., 18):

> "*Upon the facts of record we find* that the divisions of interstate joint freight rates on traffic interchanged between the Orient and its immediate connections are unjust, unreasonable, and inequitable, and that for the future in respect of traffic originating or terminating on the Orient just, reasonable, and equitable divisions of such joint rates accruing to each of the connecting lines should, on the average, not exceed the following percentages of such divisions:
>
> | | |
> |---|---|
> | Abilene & Southern | 85 per cent. |
> | Atchison, Topeka and Santa Fe | 75 per cent. |
> | Chicago, Rock Island and Pacific | 80 per cent. |
> | Clinton & Oklahoma Western | 90 per cent. |
> | Fort Worth & Denver City | 70 per cent. |
> | Galveston, Harrisburg & San Antonio | 75 per cent. |
> | Gulf, Colorado & Santa Fe | 70 per cent. |
> | Midland Valley | 80 per cent. |
> | Missouri, Kansas & Texas of Texas | 80 per cent. |
> | Missouri Pacific | 80 per cent. |
> | St. Louis-San Francisco | 80 per cent. |
> | Texas & Pacific | 80 per cent. |
> | Wichita Falls & Northwestern | 75 per cent." |

In the case before us the order of the Interstate Commerce Commission very markedly resembles that overturned by this court on January 21st in *United States* v. *New York Central et al.*, the interchangeable mileage scrip case. That is, "after thus excluding the grounds upon which the order could be justified," as the Court put it, "the Commission" proceeded to enter the order.

The specific tenor of the evidence of the Orient was that it could not pay operating expenses and that it had been almost steadily unable to pay operating costs. And the tenor of the report of the Commission (Trans.,

11) was that one of the Orient companies went into receivership in 1912 and the other company was organized in 1914 to take over its property; and that a receiver for the latter company was appointed in 1917. The Commission further discussed (Trans., 12) the fact and put it in tabular form that from 1912 to 1921, a term of ten years, the Orient had shown a deficit in all years but three. To illustrate this further the Commission's comments on the inability of the Orient to pay interest are quoted (Trans., 14):

> "The deficits in railway operating income for the years ended December 1, 1920, and 1921, have already been shown as $1,407,106.97 and $860,740.81, respectively. According to the estimate of the Orient, the deficit for 1922 will amount to $1,590,213. For the year ended December 31, 1920, interest was accrued amounting to $311,526.65, of which only $17,622.95 was paid. For the year ended December 31, 1921, interest accruals amounted to $514,665.32, of which $150,000 was paid, this payment being applicable to a loan of $2,500,000 to the receiver, of the Kansas City, Mexico & Orient Railroad Company under Section 210 of the Transportation Act, 1920."
>
> *K. C. M. & O. Divisions*, 73 I. C. C. 319.

The Commission commented in its report upon the application of the Orient to the Labor Board for a reduction of wages; and also upon the proposal under consideration to make the Orient a differential route, that is, to fix through rates by that route on a slightly higher basis.

But there was not a syllable in the Commission's utterances in review of the testimony presented and of the financial condition of the Orient that indicated that the divisions in effect were, as such, in any way "unjust, unreasonable, inequitable, unduly preferential or prejudicial" under Section 15(6).

After writing an opinion clearly showing that the

question of the reasonableness of the divisions as such was no more in the mind of the Commission than it had been in the mind of the applicant when it drafted its application, the Commission concluded with (Trans., 18) the finding previously quoted "upon the facts of record"—not one of which facts it stated. The brief for the United States does not attempt to find a fact in the record.

The sum and substance of the record before the Commission was that the Orient had been insolvent in all but three years of its operating existence; that the Interstate Commerce Commission had lent to it $2,500,000; and that thereafter the Orient asked for a hearing and the Commission granted it for the purpose of determining, not what would be "just, reasonable, and equitable divisions thereof to be received by the several carriers," as required by Section 15 (6), but "to deduct," as the Orient's application stated (Com. 11), "from the earnings of the stronger lines who have participated in a shipment, *after having applied the existing carriers' divisions,* one per cent on each $1,000 gross earnings per mile, and apply this percentage difference to the weaker lines participating in the haul."

The written application of the Orient (Com. 5), the brief and argument in support of the application (Com. 37), the testimony in behalf of the Orient put in before the Commission by its general traffic manager (Com. 74), and the long report of the Commission discussing the Orient's situation (Trans., 10), all show that the proceedings were not intended to deal with "just, equitable and reasonable divisions" as such, but to employ Section 15 (6) for financing a weak road instead of helping it under Section 15a (5) *et seq.*, as Congress intended and directed the Commission to do.

Moreover, the Orient never expected help from its

connections except out of their *surplus.* It did not ask for divisions which would leave its connections with little or nothing. In the brief of counsel for the Orient in support of the applications to the Commission he said (Com. 62):

> "In financing the operations of the weaker lines, the Commission has two available methods:
> *First.* It may distribute the earnings in excess of the legal return to the weaker lines in the form of a loan;
> *Second.* It may require a division of rates, fares and charges, under the plan which we prepare, which will automatically divert *this surplus* to the weaker lines."

There must be a surplus before there can be a division.

The United States District Court, three judges sitting, went through laboriously all of the testimony, all of the exhibits, and all of the extended argument of counsel which had been made to show a sufficient record; and the searching analysis which the Court makes in its opinion (Trans., 35 *et seq., Abilene, etc.* v. *U. S.* 288 Fed. 102), amounts to a demonstration not only that the Commission had no evidence to sustain the finding that the divisions were "unjust, unreasonable and inequitable," but also that it did not conduct a hearing for the purpose of ascertaining the facts in that regard.

The Commission's sole purpose was to distribute to the Orient money which it badly needed, but it made the fundamental mistake of not first providing the funds.

Because a carrier loses money, that does not prove that its share of the earnings is inequitable.

The District Court said:

> "We appreciate the fact that the ability of the Commission to make proper deductions and conclu-

> sions from statistics embodied in these exhibits, with which it is their duty to constantly deal, is far greater than ours; but after prolonged study of these exhibits we have been unable to find in them any proof which in our judgment tends to show what the existing divisions were, or to support a conclusion that those divisions are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers."

After the reception by the Commission of what has been in this record referred to as evidence it went into its archives and worked out what is known in the case as sheet 6 (Trans., 16), in which it employs an "equated ton mile," arrived at by adding to the freight ton miles three times the passenger miles (Trans., 15), "the ratio between freight revenue per ton mile and passenger revenue per passenger mile in that territory being approximately as one to three."

> "It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them."

The foregoing proposition is quoted from the opinion of this Court in 1912 in *United States* v. *Baltimore & Ohio Southwestern Company*, 226 U. S. 14 (20), where the Interstate Commerce Commission admitted that it based its conclusion that a lateral branch line connection was necessary more largely upon its own investigation than upon the testimony of witnesses.

Two months after the Baltimore and Ohio case just cited was decided this Court had to do with the record made by the Commission in a rate case, and it there set aside once for all the theory long held by the Commission, that it could decide a particular case, not upon the evidence and the exhibits received by it in open hearing in the presence of the carriers, but that it might bring to its aid in reaching its conclusion information

which it had gathered in other cases or in other investigations. This Court said:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficiently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."
>
> *Interstate Commerce Commission* v. *Louisville and Nashville* (Jan. '13), 227 U. S. 88 (91).

In the foregoing case the carrier introduced in Court all the evidence before the Commission and contended that "this evidence utterly failed to show that the rates attacked were unreasonable."

While the Court held that the record contained some substantial evidence, and also that there was a conflict which "the courts cannot settle," it laid down the rule quoted, and added, in answer to the argument that the Commission is an administrative body and not strictly bound by the rules of evidence (p. 93):

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days."

This last paragraph, important in the highest degree, is omitted in the brief (p. 35) *for the Commission when it quotes from the Louisville and Nashville Case.*

In the preceding year this Court had laid down with

great particularity the conditions in which an order of the Interstate Commerce Commission is final and those conditions in which it is not:

> "In cases thus far decided it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."
>
> *Interstate Commerce Commission* v. *Union Pacific* (Jan. '12), 222 U. S. 541 (547).

Under (4) in the foregoing an order of the Commission is invalid if the rate prescribed be confiscatory. The case at bar is in reality a rate case; and as appears in the record (Trans., 20-33), the earnings prescribed for many of the carriers would be entirely noncompensatory.

The order of the Commission was also invalid under (5) because it was contrary to—that is, unsupported by —the evidence.

This Court has held that a scintilla of evidence will not do—there must be "substantial evidence" to support the order.

> *Interstate, etc.* v. *Union Pacific* (Jan. '12), 222 U. S. 541 (547).

Where the question was whether the earnings of dividends by a carrier shed any light on the reasonableness or unreasonableness of a particular rate, this Court laid down a principle which shows that the financial ability of the appellees here to pay, and the financial inability of the Orient to get along, are matters absolutely without any bearing on the case:

> "For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."
>
> *Interstate, etc.* v. *Union Pacific* (Jan. '12), 222 U. S. 541 (549).

Now, we contend that the tenor of the report of the Commission (Trans., 10 *et seq.*) is that the Orient must be helped, and the tabulation worked out by the Commission after the hearing to give it help (Trans., 16), taken with the deductions made by the Commission from the earnings of the several appellees (Trans., 18), shows unmistakably that the order was based on the need of the Orient for money and the assumed ability of appellees to pay, a heavier deduction being made from the earnings of the so-called "stronger lines."

But according to the foregoing case, the financial condition of the Orient and the financial condition of any one of appellees could not be taken into account. Up to the time of the Transportation Act that was settled —that the Interstate Commerce Commission could not help the Orient out of the revenues of its more fortunate connections. But a new section was put in by the Transportation Act for the purpose of assisting weak carriers *after* some of the stronger lines in a group territory had earned from the rates more than 5.5 to

6 per cent. By that enactment Congress recognized that money cannot be taken from one carrier and transferred to another when the first carrier has not earnings sufficient for itself. Therefore, Congress provided a plan whereby strong carriers might earn a surplus, not for themselves, but for the benefit of the weaker lines within a group. It appeared from the Commission's own calculations (Trans., 16) that the earnings of all carriers in the territory served by the Orient are inadequate, with few exceptions. Consequently, the Commission could not, under the case just before cited, take earnings from such carriers and transfer them to the Orient, no matter how badly off the latter was.

"The transportation act discloses no intention," said the District Court (Trans. 46), "to vest the commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it. It exhibits a contrary purpose in section 15-a, because that policy would tend to bring all carriers to the same level in earnings and there would be no necessity for loans and no fund probably could be recovered for making them."

Our review of the record discloses that the Commission made no inquiry whatsoever into the efficiency or inefficiency of the operation of the Orient, although it quoted in its opinion (Trans., 12) the provision of Section 15 (6) requiring it to "give due consideration, among other things, to the efficiency with which the carriers concerned are operated." How many trains per day the Orient operates in each direction, whether one-fourth or one-half of the number of trains would sufficiently meet the needs of the public, whether it was wisely or unwisely spending money in the transportation service—these seem to have been matters of no mo-

ment, notwithstanding that Congress said that they must be ascertained in a division case.

Instead of following the statute in this respect, the Commission seems to have put the onus upon appellees (Trans., 14):

> "No allegation of inefficient operation appears against the Orient or any of the respondent connecting lines."

Congress made it the affirmative duty of the Commission to ascertain the facts in this relation. It was not the duty of connections of the Orient to make any "allegation" whatsoever.

However, as we pointed out at the beginning, the Orient itself (Com. 297), by its Exhibit 20, showed an operating ratio of 111.63, meaning that it was costing the Orient $1.1163 to earn a dollar. What further "allegation of inefficient operation" did the Commission need, and why did it not follow up the clue?

After setting out sheet 6 (Trans., 16), disclosing the "equated ton mile," the Commission says in its opinion (Trans., 17):

> "The gross revenue of the Orient per equated ton mile is greater than that of nine of its connections."

That is, on the Commission's own figures as to work done the Orient had generally the better of divisions.

The Commission says (Trans., 17):

> "Its [the Orient's] earnings per car mile are substantially smaller than eleven of the thirteen connections."

That means nothing except that the road in a region of thin traffic cannot have the big carloads that are obtained by carriers serving coal mines, great grain fields, steel mills, and other sources of heavy tonnage. The fact stated is of no importance in this case.

The Commission continues (Trans., 17):

> "The operating expenses per equated ton mile are greater than those of any connection except two small roads."

We previously disposed of that when we pointed out that the Orient itself had made proof (Com. 297) by its Exhibit 20 that its cost of earning a dollar was $1.1163.

Pointing out (Trans., 17) that it cost the Orient 41 per cent more than it costs its connections to earn $1 in freight service, and 75 per cent more to earn $1 in the passenger service, the Commission concludes (italics ours):

> "This disparity * * * *would seem* to indicate that the passenger fares and freight rates and divisions accorded this carrier are not sufficient."

On the contrary, it plainly indicates—without any seeming—either that (1) the Orient is inefficiently managed, or (2) that it is rendering more service than the density of its traffic justifies, or (3) that the territory which it serves and the traffic which it can secure do not justify its existence.

Moreover, an important order like this should not be based upon anything that *seems* to be.

II.

THE HISTORY OF THE NEW ENGLAND DIVISIONS CASE SHOWS MORE CLEARLY THAN IT COULD OTHERWISE BE EXPLAINED THE COMPLETE DEFICIENCY OF THE RECORD BEFORE THE COMMISSION IN THE PRESENT CASE.

That history will be referred to briefly to show the difference between the "full hearing" required by the act and the so-called hearing in the case at bar.

First, the complainants in the New England case of-

fered abundant evidence directly touching divisions (italics ours):

> "Complainants submitted exhibits showing the divisions as between the New England roads and their western connections of several thousand joint rates applying between every division block of complainants other than the Bangor & Aroostook and representative points of traffic importance in all parts of the eastern group. *One of the principal witnesses for defendants testified that the selection was illustrative and fair.*"
>
> *Bangor & Aroostook R. R. Co. et al.* v. *Aberdeen & Rockfish R. R. Co. et al.* (Jan. '22), 66 I. C. C. 196 (201).

In this case there was no proof of what the existing divisions were or what ones, if any, were too high or otherwise inequitable. As the traffic of the Orient consisted largely of live stock (Com. 84), grain, cement and a few other commodities, the local traffic being too small (Com. 85) to find, it would have been no trouble for the Commission to require the Orient to make open and specific proof of what its divisions were to the leading live-stock markets, to the leading grain markets, and on a few of its other chief commodities. In the New England case that was definitely done and the defendants had an opportunity to meet it.

We do not contend, as the brief for the United States says, that "all of the division sheets applying to all of the 13 connecting lines and the 40 defendants before the Commission as well" were necessary in evidence, although it would have been no burden upon the Orient to put them in. The bulk of the revenue of the Orient came from three or four commodities, and the divisions on those at least should have been dealt with at the hearing.

Second, in the New England case the Commission

made no order concerning commodities as to which no evidence of divisions had been given (p. 200):

> "There is no evidence with respect to the divisions on coal and coke, fluid milk and its edible products, high explosives, or certain low-grade commodities moving short distances. Nor were divisions of the Bangor & Aroostook shown. *Findings cannot be made with respect to any of these divisions, and complainants do not now ask for such findings.*"

If the lack of evidence on what divisions were in the New England Case prevented an order, why was an order made without such evidence in this case?

Third, in the New England case there was definite evidence of a change of conditions which made divisions once reasonable entirely unreasonable (p. 201):

> "The further evidence with regard to the effect of the recent extraordinary changes leads inevitably to the conclusion that the scales which formerly hung approximately level as between the participating carriers are now tipped against the New England roads."

Fourth, the Commission pointed out (p. 202) that when it granted in *Ex Parte* 74 an advance of rates under the Transportation Act of 1920 (58 I. C. C. 220) it called attention to the financial condition of the New England lines and cautioned the carriers "to give careful consideration to the joint rates accruing to these lines," which the carriers failed to do. That is, the Commission had provided by an advance of rates additional funds for the New England lines which the connections of those lines had failed to give. In the case before us, on the contrary, the Commission reduced on January 1, 1922, as previously shown, some of the advances accorded to the Orient in Ex *Parte* 74 as one of the lines in the western group. That reduc-

tion on grain and other farm products cost the Orient (Com. 77) $214,800 per year. Its connections lost seriously.

Fifth, the special three-judge Court, which was convoked when the eastern carriers filed a bill to enjoin the operation of the Commission's order in the New England case, said:

> "Upon the hearings before the Interstate Commerce Commission evidence was offered to support the claims advanced by the petitioning New England lines. Such testimony is in considerable volume and was given in considerable detail. It established that the joint rates in New England were established in the early 70's and most of the New England road's divisions dated back more than 32 years ago, and in spite of the changes in the railroad situation, the basis of these divisions has remained practically unchanged.
>
> *Akron, etc.* v. *United States* (May '22), 282 Federal 306 (308).

That alone was evidence justifying some change of divisions. The District Court quoted from the report of the Commission showing the extraordinary and unusually expensive transportation service which the New England carriers were obliged to render in comparison with that of western lines (p. 209):

> "Their hauls are short; their traffic splits at different junction points, and is diffused over many secondary and branch lines; their train loads are necessarily relatively light; the density of their freight traffic is relatively low; and, while their investment per mile of road is low, their investment per revenue ton mile is relatively high."

Sixth, when the New England case came to this Court it was found that the facts of record before the Commission disclosed an indefensible condition in New England, the earnings of one carrier, for illustration,

from freight local to its line being four times as high as that received from existing divisions.

New England Divisions Case, 261 U. S. 184 (192).

Seventh, this Court said in the New England case (p. 195):

> "There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention."

But in the present case the charge of confiscation was distinctly alleged in the bill and proof of the confiscatory effect of the Commission's order was made (Trans., 33) in the District Court.

III.

AS SECTION 15 (6) HAS BEEN CONSTRUED BY THIS COURT THE COMMISSION CANNOT TRANSFER DIVISIONS FROM ONE CARRIER TO ANOTHER FOR THE FINANCIAL HELP OF THE LATTER UNLESS THE FORMER'S EARNINGS ARE SUFFICIENT UNDER EXISTING RATES.

Discussing in the New England case the purpose of Congress in Section 15a of the act, that the Interstate Commerce Commission establish such rates as would provide funds for the help of the weaker carriers, the Court said that Section 15a, relating to excess earnings, must be read in connection with Section 15 (6), relating to divisions:

> "To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling

> the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was indeed indispensable."
>
> *New England Divisions*, 261 U. S. 184 (191).

Now, as by Section 15a (6) Congress specifically provided for excess revenue to a well-situated carrier before there should be any distribution to a weaker line, it follows, since this Court has put the two sections to one purpose, that until the Commission has allowed such rates as will give to a well-situated carrier earnings beyond the level specified in the law, its revenues cannot be depleted for divisions on the ground that another carrier needs assistance. The Commission may change divisions when it finds, as a matter of fact, regardless of the earnings of either carrier, that they are "unjust, unreasonable, inequitable, or unduly preferential or prejudicial," within Section 15 (6) by any of the usual standards of judgment. But when it comes to transferring money from one carrier to another under the policy of Congress stated in the Transportation Act, it must first provide the money to be distributed under Section 15 (6) as it is required to do under Section 15a (2) *et seq.*

This condition existed in the New England Divisions case. The Commission had provided the revenue by various advances and had told the carriers to take care of the New England lines, which they failed to do. As this Court said, there was no question of confiscation, and there could have been none on that record. But, as be-

fore pointed out, the advances in the western group made to the Orient and its connections in *Ex Parte* 74 were taken away in considerable part on the first of January, 1922.

On the correct reading of Section 15 (all of it, not segregated phraseology, for it is the rate-making section of the law, which was introduced in Roosevelt's administration) and on the difference between dividing *existing* rates which may be unfairly apportioned, and the double duty of *fixing* AND *dividing* joint rates, we quote the lucid statement of the District Court (Trans. 46-7):

> "No one but participating carriers are interested in a redivision of existing rates. So that it seems obvious to us that the phrase in paragraph 6 so much relied upon intends that all of the subjects named for consideration have application only where the inquiry goes to the extent of both fixing and dividing the joint rates; and that where it extends only to a division of existing rates some of the things named for consideration by the commission have no relevancy to or weight in determining what the new divisions shall be. In such an investigation we think the controlling inquiry must necessarily be directed to ascertaining the amount and cost of service to each of them."

It is argued in the brief for the Interstate Commerce Commission (p. 56) that although the earnings of the Orient's connections in the western group may have been inadequate, nevertheless the Commission could order the connections to enlarge their divisions to the Orient and leave it to them to apply for an advance of rates or otherwise make provision for the money necessary to support the Orient. In view of the fact that the petition of the Orient to the Commission was based in great part upon the Commission's reduction of the rates to it to the extent of $214,800 per annum (Com. 77, 267), an application for an advance could not have been made with

any hope. It is a maxim that the law does not require one to do a manifestly idle thing.

Why did not the Commission go into this subject and find out what were the needs of the carriers in the western group and provide a level of rates which would have taken care of them all and given them a margin over for the help of the Orient? That is the course which it took in the New England Divisions case.

In *Dayton-Goose Creek Railway Company* v. *United States,* decided January 7, 1924, this Court construed Section 15a, which directs the Commission to provide out of rates a surplus for distribution toward the upbuilding and efficiency of weaker lines. It held that the excess earnings thus secured by stronger lines under rates prescribed by the Commission make a trust fund which is received and held by the earning carriers for the benefit of others. But under the plain provision of the law there must be an excess before there can be a distribution.

Now, taking the decision of this Court in the New England Divisions case, in which rates sufficient for all lines had been provided before the divisional order was made, and then taking the decision of this Court in the Dayton-Goose Creek case, in which there was no dispute that the carrier had earned more than 6 per cent on the value of its property, and we have the two sections of the law operating where the Commission had provided, by establishing rates, adequate revenues for all of the carriers concerned, including an excess for distribution among the weaker ones.

But in the present case the Commission disregarded not only the intention of Congress, but it also took away from those who had not. For all of the other carriers in the western group had suffered similarly from the

freight reductions made by the Commission on January 1, 1922, and were earning less than the Transportation Act allowed to them.

Moreover, it appeared of record in the District Court (Trans., 34) that the Railroad Commission of Texas had held, upon on application of the Orient for an increase of state rates, "that the existing freight rates applicable to the movements of traffic between the Kansas City, Mexico & Orient Railway Company of Texas and its connections seem just and reasonable, and that the prayer of the petition herein should not be granted." The Texas Commission pointed out that in the hearing "the stressed financial condition of a railroad company as a factor in arriving at a just division to accrue to it of a joint freight rate" was urged. Since the Interstate Commerce Commission had reduced the interstate rates and the Texas Commission had refused to advance the state rates, the suggestion in the brief of the Commission (p. 56), that "if some of the rates are too low the carriers have a right to raise them to a reasonable basis," is entirely without merit.

We repeat that whether the Commission acts under Section 15 (6) or under Section 15a its providing adequate funds must precede a distribution.

IV.

THAT PART OF THE RECORD UPON WHICH APPELLANTS HAVE BEEN DRIVEN TO RELY SUPPORTS FULLY THE CLAIM OF THE CARRIERS.

In the brief for the United States no attempt is made to point out in support of the Commission's order anything openly offered in evidence before it during the hearing. The silence of counsel for the United States is

a concession of our contention. He argues that the carriers are bound by their reports to the Commission and that the contents of those reports may be legally used as they were, without any warning under the rules established by the Commission as to what parts of the reports would be employed or in support of what proposition they would be used.

In a footnote to the New England Divisions Case (p. 198) this Court said:

> "Papers on the Commission's files are not a part of the record in a case,—unless they are introduced as evidence."

That was said of tariffs of rates, which the law requires the carriers to print and publish.

But in the brief for the Commission (pp. 40 to 42) the position assumed in the District Court is reoccupied and there is repeated the minutest examination of Exhibits 25 and 26 (Com. 326-327), as well as the exhibits following, 27 to 41, to show support for the order made. The District Court said (Trans., 42):

> "Confessedly, from the arguments of counsel and their briefs, the issue comes down to the inquiry whether or not the necessary facts in support of the Commission's order can be found in the exhibits; otherwise there is no proof on which the order can be rested."

The correctness of that statement is shown by the fact that in the brief for the Commission, in this Court, under Title III, pages 30 to 51, asserting that "there was sufficient evidence before the Commission to support its order," not a syllable of the oral testimony on any aspect of the case is mentioned. The whole argument narrows down to the exhibits and to the deduction made from them and from its archives by the Commission. Not a word on any of the matters specified by the Act of Congress as requiring careful investigation. Not a word

about "the efficiency with which the carriers concerned are operated." Not a word about "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property"; and especially not a word as to whether appellees were situated financially to bear the order made. Not a word with respect to whether "any particular participating carrier is an originating, intermediate, or delivering line," as required by the Act, concerning any kind or kinds of traffic.

On that state of the record the District Court said (Trans., 44):

> "Counsel for the Commission does not argue that the exhibits alone show the divisions or that they are unjust and inequitable, but for that purpose contends that the exhibits, coupled with data taken from the annual reports of the Orient and of the thirteen plaintiff carriers, which are set out in tabulated form in the Commission's report, sustain the conclusion of fact and order. He concedes that the data so made up from the annual reports as in part the basis for the Commission's conclusion could not be obtained from the testimony and exhibits in the case, but contends that the Commission had a right to consider the annual reports filed with it by the carriers for the purposes for which they were used in reaching its conclusion."

The annual reports of the carriers were not in the record in this case, according to the rule laid down in the footnote in the New England Divisions case hereinbefore quoted.

The brief for the Commission discloses a total disregard by that body of the requirements of Section 15 (6) for "prescribing and determining the divisions of joint rates." This is because, as we remarked at the outset, the Commission believed that it could distribute money where money was needed, and it therefore looked into

nothing but the needs of the Orient. The District Court said (Rec., 42):

> "The building of a line into nonsupporting territory, or into a field already adequately served, cannot be justly debited to other carriers."

It now becomes necessary to take up Exhibits 25 and 26 (Com. 326-327), upon which counsel relied chiefly in the District Court, and upon which they chiefly rely (p. 41, *et seq.*) in the brief for the Commission in this Court, as well as the exhibits following, 27 to 41; and to take up also sheet 6 (Trans., 16), which the Commission prepared from its archives after the hearing had ended and which it sets out as a justification of the order made.

Let it be kept in mind, as the District Court said in the language before quoted, that the exhibits alone are not enough—they must be considered with the tabulation based on a fiction known as "equated ton-miles."

We shall consider first the exhibits and then the tabulation.

Exhibits 25 and 26.

The exhibits, as a glance at them reveals, were simply recapitulations of tons of freight traffic either delivered to or received from connecting lines by the Orient during 1921. They showed for the Orient and its connections, respectively, the ton-miles, the revenues, and the revenue per ton-mile resulting from that interchange.

But there is absolutely nothing in those exhibits disclosing the kind of traffic handled, whether it consisted of cotton, cotton linters, grain, live stock, plaster, citrus fruits, fresh fruits, vegetables, or lumber, all of which the Orient interchanges with its connections.

There is nothing to tell whether in the handling of any particular kind of traffic the Orient or any of its connections acted as "an originating, intermediate, or delivering line"—among the most important factors to be

known in fixing fair divisions, and specifically named in the law for ascertainment and consideration.

There is nothing to show the length of miles or the character or kind of service performed by either the Orient or any of its connections with respect to any particular kind of traffic interchanged—factors also indispensable to the ascertainment of equitable divisions.

There is nothing to show the cost of service to either the Orient or any of its connections as to any particular kind of traffic.

There is nothing to show what the divisions per se were between the Orient and its connections with respect to each or any of the various kinds of traffic interchanged. The divisions themselves being unknown in the record, how could the Commission legally "find" them unjust?

Finally, there is not a thing in those exhibits or elsewhere in the record to indicate compliance by the Commission with the very first command from Congress, namely, to "give due consideration, among other things, to the efficiency with which the carriers concerned are operated"—except, of course, that the Commission was notified by Complainants' Exhibit 20 (Com. 297) that it was costing the Orient $1.1163 to earn a dollar.

It was, therefore, impossible for the Commission to determine from the testimony before reviewed and those exhibits what service the Orient or its connections performed for any class or commodity of traffic, or what the cost of such service might be, or what were the existing divisions. Consequently, it was impossible for the Commission to make a valid finding that existing divisions were "unjust, unreasonable, inequitable or unduly preferential or prejudicial," within the law.

At the bottom of page 41 of the brief for the Commis-

sion this sentence follows a discussion of Exhibits 25 and 26 and an illustration of what they prove by a reference to the Santa Fe:

> "Like information is shown as to the business interchanged on joint rates between the Orient and each of its connections."

If it is meant by that to say that the results as to ton-mile revenues will be the same or even approximately the same as they show for the Santa Fe and the Orient in the example cited, the statement is misleading. For a simple calculation of the ton-mile earnings and revenue of the Orient and its connections contained in Exhibits 25 and 26 shows that as to all traffic exchanged the average revenue per ton-mile for the Orient is .0147, while the earnings of all connections is .012. In other words, the exhibits upon which the Commission relies clearly show that upon all of the traffic interchanged with its connections the Orient is given approximately 3 mills per ton per mile more than its connections receive.

Since Exhibits 25 and 26, introduced by the Orient, show that it was receiving on interchange traffic about three mills per ton per mile more than appellees were receiving for their service, the Commission was thereby notified that some direct and positive evidence of extraordinary conditions would be necessary to overcome the existing fact that the Orient was already receiving more than its share of the earnings.

The brief for the Commission (p. 47) says that "the existing divisions did not properly reflect the relative burdens borne by the connecting carriers." To support that a comparison is made between the average per ton-mile revenues accruing to the Orient and its connections on the *interchange* traffic with the operating expenses per equated ton-mile on *all* of the tonnage moved either by the Orient or by its connections.

That is clearly an erroneous comparison, because the per ton-mile revenues were based only on traffic *actually interchanged* between the Orient and its connections, while the operating expenses per equated ton-mile, as determined by the Commission, include the expense to the Orient of handling the traffic *local* to its line, and, in so far as the connections of the Orient are concerned, include not only the expense of handling their local traffic, but also that of traffic interchanged with connections other than the Orient in the movement of which the latter did not participate.

There is absolutely nothing in the record to show that the average cost of handling ALL *traffic is comparable with the cost of handling* INTERCHANGE *traffic.*

It may be more or it may be less, but there is nothing to disclose what the real facts are.

Having shown that Exhibits 25 and 26 prove that the Orient was receiving a larger share of the earnings than its connections were getting, we pass from those exhibits, so much relied upon in the District Court and in the brief in this Court, and give attention to sheet 6 in the report of the Commission.

The Equated Ton-Mile.

The "equated ton-mile" on which the Commission turned its decision against the carriers is a figment of its mind and utterly worthless for the purpose to which it was put. The Commission admits (Trans., 15) that "the reduction of gross earnings or expenses to units of this character does not produce absolutely correct results."

And counsel for the Commission say in the brief (p. 48):

"We make no claim, of course, that the Commis-

sion had before it figures from which it could reach its conclusion by the simple application of a mathematical formula based upon unit revenues, unit costs, operating ratios, etc."

It is impossible for the Commission to add "to the freight ton miles three times the passenger miles." A freight ton-mile expresses horse-power spent or labor done. A passenger-mile means distance traveled without any relation to the cost or labor of compassing the distance. You cannot add weight carried to distance traveled and thereby produce any sound measure of what the Commission calls "all revenues and all expenses." There is no way to reduce tons hauled and passenger-distance traveled to a common denominator.

If the Commission desired to get at "all expenses," it might have dealt with the gross ton-miles (combined weight of the car and the load) in the freight service and the gross ton-miles in the passenger service. Then it would have been dealing with horse-power expended—that is, the relation of costs to earnings in each of the two branches of the transportation service. The ratio of those two expenditures of horse-power might, perhaps, be a basis for dividing "all expenses," or the costs of earning the money in each of the two branches.

And even after that had been ascertained, a comparison of "all expenses" on the Orient with all expenses on its connections would have but little if any illuminating (and no probative) value until it had been shown that the relationship between freight and passenger traffic on the Orient was the relationship on each of its connections. That is, the figures obtained would prove nothing in a comparison with those of a road carrying treble the passenger business of the Orient and perhaps half as much freight traffic, or with a road having ten times the freight traffic of the Orient and little or no passenger traffic.

Therefore, "in comparing the revenue needs of the" Orient "and its connections," as the Commission did (Trans., 15), the equated ton-mile, "derived by adding to the freight ton-miles three times the passenger-miles, the ratio between freight revenue per ton-mile and passenger revenues per passenger-mile in that territory being approximately as one to three," it used, in our opinion, a false and consequently worthless factor.

It is to be emphasized that none of the data submitted by the carriers on the request of the Commission had anything to do with passenger-miles or passenger traffic (Com. 149); and an examination of Exhibits 24 to 42 (Com. 313 to 376) shows that they deal *only* with tons and ton-miles of *freight*.

The record is totally destitute of information about the passenger business of appellees, and therefore the equated ton-mile (into the construction of which the passenger traffic enters) was made *dehors* the record.

The tabulation known as sheet 6 would not have been sufficient to support the order made by the Commission, even had it been introduced in evidence at the hearing. But the use of the matter was entirely contrary to the holding of this court in *Interstate, etc.* v. *Louisville & Nashville*, 227 U. S. 88 (91), in which it was said that everything upon which an order of the Interstate Commerce Commission is based must have been laid upon the table at the hearing for the carriers to examine and controvert; and the Commission's action was in disregard of a specific objection made by counsel for the carriers (Com. 73) at the outset of the case:

> "Mr. Wood: If anything from the annual reports is to be considered in the case it should be made formally a part of the record by abstract or extract therefrom."

The Examiner, following Mr. Wood's objection, said

(Com. 74): "I feel constrained to proceed under the rule of the Commission," referring to Rule XIII of Rules of Practice before the Commission, paragraphs (a) and (b) of which are quoted in full (Trans., 44-45) in the opinion of the District Court. The rule requires that matters contained in books, papers or documents and offered for introduction must either be read into the record in the presence of the opposing party, or else "a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties." And where anything in the files of the Commission is offered the party "offering the same must give specific reference to the items or pages and lines thereof to be considered." Even when it is desired to refer to tariffs or reports "it must be done with the precision specified in the second preceding sentence." Finally, "When exhibits of a documentary character are to be offered in evidence, copies must be furnished to opposing counsel." That long-standing rule of the Commission, upon which counsel for the carriers relied in the statement by Mr. Wood just before quoted, was entirely disregarded by the Commission when it prepared sheet 6 and turned its decision against the carriers upon that compilation.

Later in the case (Com. 129) this objection was made:

> "Mr. Wood: The respondents will object to the consideration of anything not offered in a public hearing."

In preparing sheet 6 from matter not introduced at the hearing the Commission disregarded its own rules of practice.

"Papers on the Commission's files," said this Court in a footnote to the New England Divisions case, "are not a part of the record in a case—unless they are introduced as evidence."

From the foregoing consideration of Exhibits 25 and 26 and Exhibits 24 to 42 we see that they prove, not that the divisions of the Orient are "unjust, unreasonable, inequitable, or unduly preferential," but that on all of the traffic interchanged the Orient received $.0147 per ton mile for the services performed and its connections received $.012.

As to sheet 6 constructed out of an equated ton-mile, the Commission itself says (Trans., 17):

> "The gross revenue of the Orient per equated ton-mile is greater than that of nine of its connections."

The railway operating income, shown in the last line of sheet 6, discloses that only four of the thirteen appellees earned, even according to the record thus made up by the Commission, as much as 5½ to 6 per cent authorized by Congress in Section 15a (3). On such a record the Commission could not make a division of rates without first having provided, as it did in the New England Divisions case, the necessary money for division.

V

ACCORDING TO THE TABULATION PREPARED BY THE COMMISSION KNOWN AS SHEET 6 THE DIVISIONS PRESCRIBED BY IT FOR THE CONNECTIONS OF THE ORIENT ARE GENERALLY CONFISCATORY.

Elsewhere in this brief we have shown that according to exhibits 25 and 26, relied upon by opposing counsel in the District Court and by counsel for the Commission in the brief in this Court, the Orient received .147c per ton-mile on all traffic interchanged with it, while the interchanging connections received only .012c. The District Court commented upon that as follows (Trans. 43):

> "Comparing the rate per ton mile received by the Orient with that received by all of the 13 connecting

carriers on all of their interchange business with the Orient for the year 1921, it appears that the rate to the Orient on that basis is slightly in excess of the average to all of the connecting carriers on the same basis; that is to say, the Orient received .0147c per ton mile, while the average received by all of the 13 connecting carriers was .012c. It received a higher ton-mile rate, both on traffic which it originated and also on traffic delivered to it by plaintiffs, than they received."

That shows that thus far the record was with the connecting carriers.

In the trial Court Mr. Dana, assistant freight traffic manager of The Atchison, Topeka and Santa Fe Railway Company, took up (Trans., 30) sheet 6, and showed the effect of it by introducing (Trans., 33) Exhibit B and testifying:

"There is no matter here that has not been considered by the Commission * * * I am simply showing in this exhibit for all the carriers what Mr. Fort, in reply to the interrogation of the Court, showed with respect to the A. T. & S. F. * * * The first page is a statement of ton miles and revenues under present divisions as ordered in I. C. C. Docket No. 13688 accruing to the plaintiff carriers in this proceeding on freight traffic."

Then he pointed out that the revenue of the Abilene and Southern under the order of the Commission would be 3.733c, while its operating cost would be 3.249c. The revenue for the Santa Fe would be 1.449c and its operating cost 1.097c. For the Rock Island the revenue would be .868c and its operating cost 1.157c. The Clinton, Oklahoma and Western would earn 3.982c under a cost of 4.06c. And so on. As to the first sheet Mr. Dana concluded (Trans., 31):

"Under sheet 1 of the Exhibit 11 of the 13 carriers are shown to suffer a loss under the order of the Commission. On sheet 2 but 10 are shown to suffer a loss."

In the first sheet Mr. Dana took the data submitted by the Orient (Com. 326-7) in Exhibits 25 and 26 and compared them with the divisions allowed and the costs stated by the Commission.

In sheet 2 he took the data submitted by appellee carriers on the request of the Commission near the close of the hearing and contained in Exhibits 27 to 42, inclusive, shown at pages 328 to 376 of the Commission's record. That comparison showed that 10 of the 13 carriers would fail to receive operating costs from the divisions ordered.

On what a public service corporation should earn we shall be content with quoting from one decision of this Court:

> "We cannot approve the finding that no rate yielding as much as 6 per cent upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that 8 per cent was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other business in the vicinity; 7 per cent being the 'legal rate' of interest in Nebraska. Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of 6 per cent upon its invested capital."
>
> *Lincoln Gas* v. *City of Lincoln* (June, '19), 250 U. S. 256 (267).

While the Transportation Act limits the earnings of a carrier to 6 per cent, it clearly says that no money shall be taken from one carrier for the help of another until it has earned in *excess* of 6 per cent. Therefore, the order of the Commission was, in addition to being confiscatory, in defiance of the expressed will of Congress.

Since on the Commission's own data and its own peculiar method of calculation the record discloses that 11

of the 13 appellees would fail to receive operating expenses out of the divisions, the holding of the District Court must be sustained. Even as to the remaining two appellees, the decision of the District Court should be affirmed because there is nothing in the record dealing with the efficiency with which the Orient is operated, the amount necessary to pay operating expenses of appellees and other expenses and a fair return on their property, and nothing as to "whether any particular participating carrier is an originating, intermediate or delivering line," all of which are required by the command of Congress in the Act.

VI.

THE ORDER MADE BY THE INTERSTATE COMMERCE COMMISSION IN THIS CASE WAS FINAL, AND THEREFORE THE CARRIERS HAD A RIGHT TO APPLY FOR INJUNCTIVE RELIEF WITHOUT PETITIONING THE COMMISSION FOR FURTHER HEARING. THEIR REMEDY AT LAW WAS INADEQUATE.

In the brief for the Commission (p. 12) it is contended that as the order of the Commission was entered by Division 4 (Trans., 10), the carriers should have applied to the whole Commission for suspension rather than to the Court for injunction.

The provisions of Section 16a relating to further hearing, which section was added to the Interstate Commerce Law in 1906, say that "any party thereto *may* at any time make application for rehearing" and that "it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear." Later in the section it is provided that on such rehearing, if it appears from the facts, "including those arising since the former hearing," the decision should be modified, "the Commission may reverse,

change, or modify the same accordingly." Those provisions were designed to meet well-known matters, namely, that neither the carriers nor the Commission could tell how an order would work out in practice, and also that in experience many orders of the Commission which appeared to be sound at first set things topsy-turvy.

The practice is the same as it is in the law courts—a party may apply for rehearing or not, according to the dictates of his best judgment. It has been held in the Federal courts that failure of a trial court to grant a rehearing cannot be assigned as error, as the granting of such a petition is a matter of discretion.

It so happened that five months before this case was tried an order was made in another case by a division of the Interstate Commerce Commission and then when the carriers filed a petition for rehearing before the full Commission the application was granted, but with the provision that the divisional order "shall be and remain in full force and effect."

Missouri & North Arkansas Divisions, 68 I. C. C. 47.

That case is still pending. Should it ever be determined in favor of the contesting carriers, their divisions will be irreparably gone. In the Missouri and North Arkansas case the line had never been operated more than a few months at a time. In such circumstances the remedy at law is in no sense adequate.

The brief for the Commission cites (p. 15) *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, to prove that we should have petitioned from the Division to the whole Commission. The Prentis case is not parallel. There the Court of last resort in Virginia had *legislative* jurisdiction over rates; and consequently when application was made to the Federal Court the last word on a legis-

lative subject had not been spoken by the State of Virginia. But here the legislative order of the Division was made final by Congress.

Section 17 (4) of the Interstate Commerce Law, which section authorizes the Commission "to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary," provides:

> "Any order, decision, or report made or other action taken by any of said divisions in respect of any matter so assigned or referred to it shall have the same force and effect, and may be made, evidenced and enforced in the same manner as if made or taken by the Commission, subject to rehearing by the Commission, as provided in Section 16 (a) hereof for rehearing cases decided by the Commission."

Section 16 (a), referred to in the foregoing language, simply provides that a case before the Commission is always open for rehearing and that the Commission may at any time modify its decision. The permission granted in the language of Section 17 (4), just quoted, is for such a rehearing before the whole Commission as might be given in a case which the whole Commission had decided.

Section 16 (a) provides very heavy penalties for failure to comply with an order of the Commission and "every distinct violation shall be a separate offense." Where the violation is continuous "each day shall be deemed a separate offense." In addition to that, Section 16 (a) denies to appellees an adequate remedy at law should the Commission decline to suspend its order and should be finally held that the reduction of their divisions in favor of an insolvent company was unjustified (italics ours):

> "Applications for rehearing shall be governed by such general rules as the Commission may establish. *No application shall excuse any carriers from com-*

plying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof without a special order of the Commission."

As the "special order of the Commission" was denied in the Missouri and North Arkansas case, why should a petition for further hearing have been made in this case?

Where the carrier will suffer irreparable damage in case its application to the Commission for rehearing should be denied and the order of the Commission should finally be held to have been invalid, then it cannot be said that it has an adequate remedy at law.

Thus, where revisions of the tax laws of Colorado left it in doubt whether a taxpayer could get relief which was plain to him under earlier statutes, the Supreme Court of the United States, reviewing the history of the legislation and the facts involved, held:

> "In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. and this, being so, the situation is not one in which cognizance of the present suit properly can be declined."
>
> *Union Pacific* v. *Weld County* (June, '18), 247 U. S. 282.

The plaintiffs here had no certain remedy before the Commission. Indeed, the Commission had warned the carriers once in a similar case, and had warned them in many other cases, that its orders must go into effect at the time specified. The Commission had been directed by Congress, as we have seen, to put its orders into effect.

But apart from all those considerations, the order by the Division is made final by the law, and therefore the

carriers had the right to apply to a court to set aside "any order made or entered by the Interstate Commerce Commission." On this point the District Court said:

> "The application for a rehearing does not operate to stay the execution of the Commission's order. The act provides that it be not stayed on such an application unless the Commission by special order grants a stay. Nothing could have been done by plaintiff's pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding."

There can be no serious difference of opinion on this point.

VII.

Conclusions.

From the foregoing examination of the record these propositions are plain:

1. That the Commission made the primary mistake of not providing money before it attempted to divide it.

2. That it gave no consideration to the command of the law to ascertain whether the Orient is well managed—the first question to which it should have found an answer.

3. That it made no inquiry into the financial condition in which the divisions prescribed would leave the connections of the Orient.

4. That its method of reaching its "finding" was farfetched, arbitrary, and wholly inconclusive.

5. That there was no evidence to show that any division accorded to the Orient was "unjust, unreasonable, inequitable or unduly preferential or prejudicial"

within the law; and that the record was entirely without evidence to support the order in any way.

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No. 486.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY,
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
THE CLINTON & OKLAHOMA WESTERN RAILROAD COMPANY,
FORT WORTH & DENVER CITY RAILWAY COMPANY,
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
GULF, COLORADO & SANTA FE RAILWAY COMPANY,
MIDLAND VALLEY RAILROAD COMPANY,
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS (C. E. Schaff, Receiver),
MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
THE TEXAS & PACIFIC RAILWAY COMPANY (J. L. Lancaster and Charles L. Wallace, Receivers),
THE WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES DEALING SOLELY WITH LEGAL QUESTIONS ARISING FROM RECORD MADE BEFORE INTERSTATE COMMERCE COMMISSION.

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St. Louis, Mo.,
February 16, 1926.

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No. 456.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

ABILENE & SOUTHERN RAILWAY COMPANY,
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
THE CLINTON & OKLAHOMA WESTERN RAILROAD COMPANY,
FORT WORTH & DENVER CITY RAILWAY COMPANY,
THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
GULF, COLORADO & SANTA FE RAILWAY COMPANY,
MIDLAND VALLEY RAILROAD COMPANY,
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS (C. E. Schaff, Receiver),
MISSOURI PACIFIC RAILROAD COMPANY,
ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
THE TEXAS & PACIFIC RAILWAY COMPANY (J. L. Lancaster and Charles L. Wallace, Receivers),
THE WICHITA FALLS & NORTHWESTERN RAILWAY COMPANY,

Appellees.

BRIEF FOR APPELLEES DEALING SOLELY WITH LEGAL QUESTIONS ARISING FROM RECORD MADE BEFORE INTERSTATE COMMERCE COMMISSION.

I.

STATEMENT OF FACTS BEARING ON THE LEGAL ISSUES INVOLVED HEREIN.

In so far as the record made before the Interstate Commerce Commission in this case is concerned, no disputed questions of fact are involved and the case turns entirely upon strictly legal issues.

However, a brief resume of the proceedings before the Interstate Commerce Commission as disclosed by a certified copy of the record before that body filed herein is necessary to properly understand the legal questions raised.

William Kemper, as Receiver of the Kansas City, Mexico & Orient Railway Company, and the Kansas City, Mexico & Orient Railway Company of Texas, composing the railroad known as the Orient System, filed a joint application before the Interstate Commerce Commission praying *inter alia* for an order "applicable to the division of rates, fares and charges" (Rec., pp. 3-15*).

The complainants in their application before the Commission *did not allege* directly or by inference that the *divisions* of joint rates accruing to them *were unreasonable, unjust* or *unduly discriminatory* (Rec., pp. 3-15). The applicants in their complaint *relied solely* upon the theory of law that the federal rate regulatory body had the power to equalize the earnings of weak and strong lines by transferring the funds of one to the other *under the guise of divisions*. The complainants tried their case, as will be hereinafter disclosed, *solely* upon that theory of the law.

In their brief filed before the Interstate Commerce Commission, the complainants clearly disclosed that

*The page references in this brief refer to the pages of the printed record before the Commission and which is on file in this case.

they were not relying for an increase in the divisions of the Orient *on the theory that those divisions* of the joint rates *were unreasonable* either *per se* or relatively, but that the law authorized the Commission to transfer the funds of the strong line to a weak line for the purpose of enabling it to pay operating expenses (Rec., pp. 37, 55, 56, 62).

Furthermore, the Commission also clearly understood that the complainants were not asking for an increase in their divisions *because those divisions were unreasonable* or inequitable for the service performed, but because the complainants *needed the money* to pay their operating expenses, taxes and interest on the loan. As proof of the foregoing we quote from the Commission's report (Rec., pp. 395, 396-398):

> "The Orient alleges that its revenues are insufficient to enable it to pay operating expenses, taxes and a fair return on the property held for and used in transportation service, or to enable it to perform properly its function as a common carrier, and contends that this condition can be remedied only by increasing its divisions of joint freight rates, or by increasing, through changes in routing, the amount of traffic it handles as an intermediate carrier. The request for changes in routing of traffic is before us in a separate proceeding * * *. In making its plea for increases in divisions and changes in routing of traffic, the

> Orient asks only a sufficient measure of relief to enable it to continue operation and makes no request for a return upon investment * * * (Rec., p. 398). Various methods of increasing its revenues have been suggested (402) * * *. As above stated, the Orient is seeking only such revenue as will enable it to operate the road and is asking nothing for its security holders'' (Rec., p. 405).

Three witnesses testified for the complainants before the Interstate Commerce Commission. *None of them testified that the divisions* accorded the Orient Railway by the appellees herein *were unjust, unreasonable or inequitable.* In fact, no testimony was introduced before the Interstate Commerce Commission tending to establish the contention now made that the *divisions* of the joint rates *were* unjust or *unreasonable.* The complainants introduced *no evidence* to show *what the divisions* of the joint rates *were* at the time of the hearing or at any other time. *No divisional sheets were introduced in evidence.* There is not a single iota of testimony in the record before the Interstate Commerce Commission showing or tending to show that the divisions accruing to Orient are unjust or unreasonable. On the contrary, Mr. Shaufler, the main witness for the Orient, and an expert traffic man, proceeded in his testimony upon the *sole* theory that under the law as it is today, a

weak line has the right to share in the earnings of a strong line in order to defray its operating expenses, as will be seen from the following testimony:

"A. It might be appropriate to say at this time that the investors and security holders of the property are not asking anything at this time for increased divisions or additional traffic in——

Mr. Boyd (Q.): Let me put that in another way, Mr. Shaufler; in your statement which you have offered here and exhibits in which you have attempted to show the needs of the Orient System for 1922, has there been included in that statement a single item to pay interest or dividends or any return to investors?

A. No, sir.

Q. The needs which you have offered here are merely for paying operating expenses, taxes and the interest on the Government loan?

A. Yes, sir.

Q. And deferred maintenance?

Mr. Wood (Q.): What needs are you talking about?

A. Needs for operating the railroad.

Q. That is, the purpose of this proceeding is to secure readjustments of divisions which will make revenue sufficient to take care of the operating expenses and the deferred maintenance and the interest on the Government loan? That is the purpose of the proceeding?

A. And that is all.

Q. Is that it?

A. Yes, sir. We are not asking for any return for the investors. All we want is to be able to

continue to operate the property at this time (Pr. Rec., pp. 57, 58).

Q. Your theory is that the Commission ought to require these respondents to make good to you the losses that have been imposed upon you by the order of the same Commission; is that what you are asking to have done?

A. We ask the Commission to be permitted to live. We are not asking anything for the security holders. It is just a question of being permitted to operate the railroads until such time as the security holders can find their way clear to complete the Orient Railroad from Kansas City to Topolobampo.

Q. And you approach this case, as I understand it, solely from that standpoint?

A. From the standpoint of being permitted to operate.

Q. Of receiving by an order of the Commission here such an adjustment of divisions as will permit you to pay your operating expenses during the period of further development of your line?

A. That is it.

Q. *That is your sole method of approach to this case that is here?*

A. *That is right.*"

The complainants introduced 26 exhibits. Six of them consisted of maps. Many of the 26 exhibits showed various and sundry statements as to the financial condition of the Orient System. None of them disclosed the division sheets or the contents thereof between the Orient Railway on the one hand and

the appellees on the other, either jointly or separately. In no exhibit introduced before the Interstate Commerce Commission was the Commission informed or given any information *as to how the joint rates* on the *various* commodities *were divided* between the Orient and its connections. A summary of each exhibit is given in the index to the printed copy of the record before the Commission.

In its order setting the case for hearing (Rec., pp. 63-66) the Commission ordered the complainants and petitioners herein to file a statement showing the number of tons and ton-miles of freight interchanged between the complainants and respondents, together with the revenues accruing to each therefrom. Complainants' Exhibits Nos. 24, 25, 26 and 27, and Respondents' Exhibits Nos. 27 and 42, inclusive, are statements which were filed at the hearing in conformity with said order of the Commission.

In its final report (Rec., pp. 394-413) the Commission made a finding in which it stated that "upon the facts of the record *we find* that the *division* of interstate joint rates on traffic interchanged between the Orient and its immediate connections *are unjust*, unreasonable and inequitable." The Commission further found that "*considering separately* the *several divisions* of interstate rates on traffic interchanged between the Orient and its connections, and having origin or destination on the Orient, there shall be

deducted from the revenue or proportion accruing under divisions to said connections" the following percentages of the divisions which the Commission ordered *should be added to* the revenue of the Orient, as follows:

	Per Cent
Abilene & Southern	15
Atchison, Topeka & Santa Fe	25
Chicago, Rock Island & Pacific	20
Clinton & Oklahoma Western	10
Fort Worth & Denver City	30
Galveston, Harrisburg & San Antonio	25
Gulf, Colorado & Santa Fe	30
Midland Valley	20
Missouri, Kansas & Texas of Texas	20
Missouri Pacific	20
St. Louis-San Francisco	20
Texas & Pacific	20
Wichita Falls & Northwestern	25

The Commission stated that it *considered separately* the *several divisions* between the Orient and the appellees in the proceeding before it, and after such consideration of the *several divisions* it *found* that *each of them was unreasonably high* to the amount of percentage indicated. If the Commission considered separately the several divisions between the Orient and the appellees, then it considered testimony which was *not offered in evidence* at the hearing; for there is not one iota of testimony in the

record before it *showing what those several divisions were.* It will be the appellees' contention that such finding by the Commission was not based upon evidence, and is without evidence in the record to support it.

In its first order made in this proceeding (Rec., pp. 63-66) the Commission made certain carriers therein named—39 of them—respondents or defendants. The record shows that all of these 39 carriers participated in joint rates with the Orient (Ex. No. 24; Rec., pp. 313-335). In addition thereto, the record discloses that there are scores of other carriers *who were parties to these same joint rates* and who were *not made respondents* or defendants in the proceeding before the Commission. Many of them receive large sums as divisions under joint rates with the Orient System (Ex. No. 24; Rec., pp. 313-325).

Notwithstanding the fact that scores of carriers—some respondents in the proceeding and many not respondents—received revenues from divisions under joint rates with the Orient, the *incidental fact of physical connection* with the Orient determined who *should contribute* and *who should not contribute.* The order in the case only runs against the carriers having direct physical connection with the Orient. For example, such small railroads as the Abilene & Southern and the Clinton & Oklahoma Western—50 miles long—were required to contribute 15 and 10 per cent,

respectively, while such railroads as the Chicago, Burlington & Quincy, Colorado & Southern, Ft. Worth & Rio Grande, Illinois Central, International-Great Northern, Kansas City Southern, St. Louis Southwestern and many other strong carriers who participate in joint rates with the Orient were not required to contribute simply because they did not have physical connection with the Orient Railway. At least, *the test* in determining whether other carriers parties to joint rates with the Orient should deplete their revenues to support the Orient *was the question whether they had physical connection with it.*

It is the contention of the appellees that if the Commission has the power to raise revenues to pay the operating expenses of one carrier by increasing its divisions under joint rates with other carriers, an order requiring the contribution to be made by those carriers which happen to have physical connection with it, is arbitrary and unlawful.

II.

ORDER IS INVALID BECAUSE A TRANSFER OF EARNINGS UNDER DIVISIONS IN VARYING PERCENTAGES FROM THE CONNECTING CARRIERS IN PROPORTION TO THEIR RELATIVE PROSPERITY, AND NOT IN PROPORTION TO THE RELATIVE AMOUNT AND COST OF SERVICE UNDER THE JOINT RATES, IS AN ARBITRARY EXERCISE OF POWER AND CONSTITUTES A VIOLATION OF THE FIFTH AMENDMENT.

The Commission in its decision in this case (72 I. C. C. 319, I. c. 328) ordered that the several divisions accruing to the connecting carriers under joint rates with the Orient *be reduced* by certain percentages and that the *amounts so deducted* from the revenues of the connecting carriers *be added to* the revenues of the Orient, as follows:

	Per cent
Fort Worth & Denver City Railway	30
Gulf, Colorado & Santa Fe	30
Wichita Falls & Northwestern	25
Atchison, Topeka & Santa Fe	25
Galveston, Harrisburg & San Antonio (one of the Southern Pacific Lines)	25
St. Louis-San Francisco Railway	20
Midland Valley	20
Chicago, Rock Island & Pacific	20
Missouri Pacific	20

	Per cent
Missouri, Kansas & Texas	20
Abilene & Southern	15
Clinton & Oklahoma Western	10

On page 325 of its report (73 I. C. C. 319) the Commission found from the annual reports on file with it —not introduced in evidence—that the rate of return upon their investments of the foregoing carriers during the year ending December 31, 1921, was as follows:

	Per cent
Fort Worth & Denver City Railway	12.13
Gulf, Colorado & Santa Fe	10.73
Wichita Falls & Northwestern	6.51
Atchison, Topeka & Santa Fe	6.27
St. Louis-San Francisco Railway	4.77
Midland Valley	4.66
Chicago, Rock Island & Pacific	4.24
Abilene & Southern	4.09
Missouri, Kansas & Texas of Texas	3.42
Missouri Pacific	2.71
Galveston, Harrisburg & San Antonio	1.88
Clinton & Oklahoma Western	1.39

An order transferring the earnings of these connecting carriers from divisions under joint rates with the Orient in varying percentages ranging from 10 to 30 per cent, *depending upon their relative prosperity* or their respective annual returns upon their investments, and *not* in proportion to the relative

amount and *cost* of *service* performed by the Orient, on the one hand, and the connecting carriers on the other, *under* their *joint rates*, as the law contemplates, constitutes an arbitrary exercise of power in violation of the due-process clause of the Fifth Amendment.

The findings and order of the Commission as hereinabove set forth conclusively demonstrate that it sought to augment the revenues of the Orient from the traffic interchanged with its connections *without regard* to the question *of whether* the present *divisions* of the joint rates *are* fair and *reasonable* and, what is more to the point, *without regard* to the question as to the relative *amount* and *cost* of the *service* of each of the said carriers under their respective joint rates with the Orient.

It was and will be said again that this seizure of earnings in varying percentages depending upon the prosperity of each line for the purpose of subsidizing the Orient was done "*to foster public interest.*" A highwayman who takes my purse is nevertheless guilty of a crime, though he may *unctuously announce* that the contents are to be used *for public charity.* The annals of the courts in construing the Fourteenth and Fifth Amendments are replete with instances and illustrations of attempts to confiscate property upon the ground of public safety, *public welfare* or public interest. No matter how high the motive, how de-

serving the object, the property of one person cannot be taken for public interest or otherwise without just compensation or without due process of law.

The principle of law governing the distribution of funds from joint rates, i. e., divisions, is well settled. It was clearly and succinctly stated by the Commission in the New England Division case (66 I. C. C. 196, l. c. 198, 199) as follows:

> "The thought dominates the law, as it is now framed, that a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative *amount* and *cost* of *service* which it renders * * *. Summing up this phase of the matter, we are of the opinion * * * that the *relative amount* and *cost* under economical and efficient management *of the service rendered* is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive."

The *manner* and *method* which the Commission adopted in increasing the divisions of the Orient conclusively demonstrate that the *relative amount* and *cost of service*, respectively, under the joint rates were wholly ignored in determining the proportion of the joint revenue which the Orient should have. On the contrary, the foregoing tables demonstrate that it was the *respective financial ability* of the various

connections to contribute a sum for the support of the Orient that *decided* the *amount* which *each should pay.*

This important fact should not be overlooked. No evidence was introduced in this record to show that the *amount* and *cost* of *service* by the Orient on the traffic which it interchanged with the *more prosperous roads* was *greater* than the *cost* and *amount* of service which the Orient performed on the traffic interchanged with the *less prosperous roads.*

It is interesting to observe how the Commission determined the *relative* contributions under the guise of increasing the Orient's divisions. The *most prosperous road,* Fort Worth & Denver, was *required to contribute 30 per cent* of its total earnings under the joint rates. A similar slice was taken from the Gulf, Colorado & Santa Fe, which was *fortunate enough to earn 10.73 per cent* during 1921. That disposed of the carriers earning 10 per cent and more.

The next to be taken were the carriers which earned 6 per cent and more. *Twenty-five per cent* was taken from the Santa Fe and the Wichita Falls & Northwestern. Then the carriers in the next lower class were attacked. *Twenty per cent* was taken from the Frisco, Midland Valley, Rock Island, Katy, Missouri Pacific and Texas & Pacific, though the latter three did not earn quite as much as the first three. The short railroad in Texas, the Abilene & South-

ern, although it earned 4.09 per cent, escaped with only a cut of 15 per cent of its earnings. The Clinton & Oklahoma Western was the most fortunate. It escaped with a levy of 10 per cent; but its earnings during 1921 were the lowest of all. The only exception to the rate of progression was the Galveston, Harrisburg & San Antonio, whose earnings during 1921 were 1.88 per cent, and which was required to *pay 25 per cent of its earnings,* but this railroad forms a component part of the wealthy and prosperous Southern Pacific System; hence the apparent exception is explained.

It is inconceivable to us that any court under our laws will sanction a legal formula by which divisions accruing to one carrier *are to be fixed and determined* by the *amount of money* which other *carriers,* parties to joint rates, *may have made.* That is communism, pure and simple. The Interstate Commerce Commission has never heretofore in any final decision applied that formula or advanced that rule. To determine just and equitable divisions accruing to a carrier by *the respective rates of return* on the property investment of its connections is vicious, inherently unsound, capricious and arbitrary. The adoption of such a rule by the Commission and the courts *will condemn efficiency, discourage* economy and *insured* the *profligacy* of *shiftless* carriers. The courts and commissions *are not created* to *equalize* the fortunes of men or of carriers.

An order which results in the transfer of money, the property of certain carriers, to another carrier, *not in consideration of any service rendered* by that carrier, is invalid. If after considering the rates involved, the method by which those rates *are divided* between the carriers, and the relative *cost* and *amount* of *service,* the Commission finds, in a division case, that one carrier is entitled to higher divisions, it has heretofore been the practice of the Commission to grant the increase in one of two ways, either in specific amounts in cents per hundred pounds or per ton, or by a percentage increase proportionate to the amount and cost of the service. Thus, in the Denver & Salt Lake Division Case, decided August 3, 1922, 73 I. C. C. 178, the Commission allowed the Denver & Salt Lake an increase of 50 cents per ton in its divisions. In the New England Division case, decided January 30, 1922, the Commission permitted the New England carriers an increase in their divisions of 15 per cent.

But in this case no such method was followed. The Orient was granted an increase in its divisions, *not measured by its own cost and service,* but it was granted a proportion of the amount of revenue which its connections received for *their services.* The anomalous and arbitrary result of the order may be illustrated. Let's assume that there is a joint rate in effect—we are compelled to make an assumption be-

cause no rates were introduced in evidence—of $1.00 per hundred pounds from a town on the Orient 25 miles from Wichita, Kansas, to a point on the Santa Fe in California. Let us suppose that the rate divides this way: 20 cents to the Orient and 80 cents to the Santa Fe; that is, 20 per cent to the Orient and 80 per cent to the Santa Fe. The Commission did not, as it has always heretofore done, increase the Orient's division by a specific amount or by a certain percentage thereof, so as to adjust its divisions to its service and cost, but it *deducted* from the revenue of the Santa Fe *for its service from Wichita to California* 25 per cent and *ordered it turned over to the Orient.* Certainly a fourth of the earnings of the Santa Fe for the transportation of the commodity from Wichita to California *cannot possibly represent* the increased *cost to the Orient* of transporting commodity *from its station* 25 miles *to Wichita.* The principle adopted is inherently wrong. Under the illustration given, the divisions of the Orient are increased not 5, 10, 15, 20 or 25 per cent, but are increased 100 per cent; that is, 20 cents is taken off the Santa Fe's revenues and added to the Orient's revenues, which enables the Orient to get *40 cents* for hauling the commodity to Wichita and the Santa Fe *60 cents* for *hauling it to California.*

III.

ORDER OF COMMISSION IS INVALID BECAUSE IT CONCLUSIVELY APPEARS AND IS ADMITTED IN ITS BRIEF THAT THE COMMISSION ARRIVED AT ITS CONCLUSION UPON STATISTICAL DATA AND INFORMATION NOT INTRODUCED IN EVIDENCE AT THE HEARING BEFORE IT.

In deciding this case, the Commission, as admitted in the briefs (see I. C. C. Br., p. 30) and as its report and certified copy of the record disclose, based its findings largely upon statistical data and information not formally offered or introduced in evidence at the hearing.

There can be no valid order by an administrative body acting in a semi-judicial capacity based upon a hearing where the parties to the litigation did not know what evidence was being considered *and are not given an opportunity to explain or refute it.* Parties to a litigation before an administrative body must be fully appraised of the evidence *considered* and must be given the opportunity to inspect documents and offer evidence in explanation (Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, l. c. 93; Whitfield v. Hanges et al., 22 Fed. 745, l. c. 749).

On page 325 of the Commission's report (73 I. C. C. 319), containing its findings, which report was made a part of the order, will be found a table giving certain statistical information for the year ending December, 1921, concerning the respondents in the case before the Commission. For example, the table shows the gross revenues of the connecting carriers respectively per ton mile, per car mile, per train mile; operating expense per train mile, per car mile, per ton mile; net revenue per ton mile, per car mile, per train mile; the return per thousand dollars investment, on the gross revenue, the net revenue and railway operating income; the percentage of return on the gross revenue, the net revenue and under operating income. From the foregoing data, so shown in the said table, the Commission, on page 326 of its report, draws various and sundry conclusions concerning the Orient, on the one hand, and the connecting carriers on the other. With the single exception of a net railway operating income for all connecting lines, which is shown in Exhibit No. 17, *none of the foregoing statistical data was introduced in evidence.*

In order to make the compilations shown on page 325 of its report, it was necessary for the Commission to have had before it the following data for all lines: Freight tons, one mile; passengers, one mile; all revenue car miles; all revenue train miles; the

total operating revenue; total operating expenses; net revenue and investment in road and equipment. *None of the foregoing data was introduced in evidence.* It is true that the record shows the total operating revenue, the total operating expenses, the net revenue, the net railway operating income, the investment in road and quipment *of the Orient System,* but none of the foregoing information *as to all respondent carriers was introduced in evidence.* Neither was the freight tons one mile, the passengers one mile, the all-revenue car miles and the all-revenue train miles *of the Orient System* shown in evidence. The operating revenues and operating expenses of the Orient System for the year 1921 are contained in Exhibit No. 11. Investment in road and equipment of that company, as of December 31, 1921, was contained in Exhibit No. 16, but *as to all the other information so shown in the report of the Commission and the deductions drawn therefrom, the record is absolutely silent.*

In the dissenting opinion of the court below the action of the Commission in this regard was justified by reason of the following sentence in Rule XIII of the Rules of Practice before the Interstate Commerce Commission:

> "This Commission will take notice of items in tariffs and annual and other periodical reports of

carriers properly on file with it, or any annual, statistical and other official reports of the Commission."

But this contention is not tenable, for the following reasons:

First. Rule XIII, when considered as a whole, clearly contemplates that if a litigant desires the Commission to consider such matters in a proceeding before it the party *must offer* such portions of such tariffs or annual reports as it desires the Commission to consider. This will enable the opposing litigant *to explain or refute it* and thereby the rights of the parties are fully preserved.

Second. If it be contended that by reason of such rule the Commission in any particular proceeding before it may consider data from the annual reports which are on file with it *without being introduced in evidence*, then the *rule is invalid*, because it deprives a litigant of his constitutional rights; for all parties to a litigation must be fully apprised of the evidence submitted or *to be considered* and must be given the opportunity to inspect documents and *to offer evidence in explanation* or rebuttal (I. C. C. v. L. & N. R. R. Co., 277 U. S. 83, l. c. 93).

Third. It is claimed that the appellees were not prejudiced and that "the carriers were not subjected to injustice" by reason of the fact that the Commis-

sion considered data from annual report on file with it. The annual reports of carriers to the Interstate Commerce Commission contain a *multitude* of data and a *great variety* of statistical information. The Commission's records contain hundreds of such reports. It was impossible for the carriers to anticipate in advance *just what* information or *data* the Commission would consider or what inference it might draw therefrom. The appellees were entitled as a matter of right to know the data which the Commission was going to consider in order that they might have an opportunity to explain or to refute it. Even pleadings filed by litigants in the same court in former cases cannot be considered as evidence or admissions unless introduced in evidence in the particular case before the Court. The same rule should apply before the Commission. It will not do to say that the facts contained in the annual reports were true in any event and that, therefore, the appellees were not hurt; for the rule that the opposing litigant *must know* the evidence *to be considered* against him applies to *truthful* evidence as well as to evidence *which is not true.*

IV.

ORDER OF COMMISSION IS INVALID BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN IT.

The issue in this case before the Commission was whether the respective *divisions* of joint rates on *various* commodities between the Orient, on the one hand, and the respondents, on the other, were reasonable. Divisions are nothing more or less than *unpublished rates.* While rates are published and filed with the Commission, division sheets are not so filed. When a shipper attacks the unreasonableness of a rate, his first burden is to show in evidence *the rate itself* as contained in the tariff; for without the rates properly before it no administrative or judicial body can pass upon their reasonableness (I. C. C. v. Railway, 227 U. S., l. c. 83). As a general rule, the same factors in determining the reasonableness of rates are considered by the Commission in passing upon the reasonableness of divisions.

On page 327 of its report (73 I. C. C. 329) the Commission stated that it *considered* "*separately* the *several* divisions of *interstate rates* on freight interchanged between the Orient and its connections and having origin or destination on the Orient." If the

Commission so considered the *several divisions*, then it must have considered testimony which was not introduced at the hearing.

We submit that it is impossible for a body, administrative or judicial, to determine whether the *present divisions* between the Orient and the Frisco, for example, on the various commodities investigated, are *unjust or inequitable* to the Orient, unless the Court or the Commission *knows how the present rates on the many commodities are divided* between those carriers, that is, unless the record before the Commission discloses the percentage of the *portion* of the joint rates which the Frisco receives, and the percentage of *the portion* of the joint rates which the *Orient receives*. These respective proportions of the rates to each line are carried and shown in what are known in railway parlance as "division sheets," which are formulated, agreed to, promulgated and published, but not usually filed with the Interstate Commerce Commission. As the division sheets showing how the rates are divided or apportioned between the Orient and the Frisco, for example, were not introduced in evidence, and *as neither the contents thereof were disclosed* in any way *in the record*, the Commission had no legal or competent *evidence to determine* whether the present divisions in effect between the Orient and the Frisco are unjust.

In the New England Division Case, 66 I. C. C. 196, l. c. 209, affirmed by this Court in 261 U. S. 184, which involved the reasonableness of the divisions of joint rates, the Bangor & Aroostock Railway Company did not introduce in evidence *its division sheets, nor did it show the divisional arrangements* between it and the other carriers. The Commission held that no finding, under these circumstances, could be made with respect to those divisions or the reasonableness thereof. It further appeared in that case that the divisional arrangements on certain classes and commodities were introduced in evidence, and the Commission confined its finding *solely* to the commodities and classes of traffic *as to which the division sheets were shown.* Said the Commission:

> "The divisional arrangements shown apply to class rates and generally to the commodity rates on articles which are classified. There is no evidence with respect to the divisions on coal and coke, fluid milk and its edible products, high explosives or certain low-grade commodities moving short distances. *Nor were divisions of the Bangor & Aroostook Railroad shown. Findings cannot be made with respect to any of these divisions,* and complainants do not now ask for such findings. On the other hand, defendants made no offer to prove that divisions in such cases are so favorable to complainants as to make up for deficiencies elsewhere, and the absence of

evidence in regard to the divisions of certain rates constitutes no reason for failure to act upon the divisions *as to which there is evidence.* With respect to the latter, complainants submitted exhibits *showing the divisions* as between the New England roads and their western connections of several thousand joint rates applying between every division block of complainants other than the Bangor & Aroostook and representative points of traffic importance in all parts of the eastern group. One of the principal witnesses for defendants testified that the selection *was illustrative and fair* (pp. 200, 201) * * *. As already stated, evidence is lacking in regard to the divisional arrangements on certain specified classes of traffic. Our action will be restricted to the divisions of class rates and of the commodity rates which divide on the class-rate basis (p. 205) * * *. We find, therefore, that the divisions of the joint class rates here under consideration and of the similar joint commodity rates which divide on the class-rate basis, other than those in which complainant, the Bangor & Aroostook Railroad Company, participates, will for the future be unjust, unreasonable and inequitable to the extent that complainants' divisions thereof shall be less than 115 per cent of their present divisions" (p. 206).

Under the law, the prime factors in determining the reasonableness of divisions are the (a) *relative amount* of the *service*, i. e., the haul, and (b) the *rela-*

tive cost of the *service*, i. e., the haul, of each carrier participating in the joint rate.

In the New England Division case, 66 I. C. C. 196, l. c. 198, 199, decided January 30, 1922, the Commission said:

> "The thought dominates the law, as it is now framed, that a paramount consideration in determining the equitable share of the joint revenue which any carrier shall receive must be the relative *amount* and *cost* of the *service* which it renders * * *. Summing up this phase of the matter, we are of the opinion * * * that the *relative amount* and *cost* under economical and efficient management of *the service rendered* is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive."

Illustrating the foregoing principle, let us assume that the rate on some commodity from station A on the Orient to station B on the Frisco is 60 cents per hundred pounds, and that the haul, i. e., the service, from A to B is 300 miles, 200 miles over the Orient and 100 over the Frisco. According to the relative amount of service, i. e., the haul, the rate should, therefore, be divided as follows: 33⅓ per cent to the Frisco and 66⅔ per cent to the Orient. But if the cost of service is greater on one road than the other, the division of the rate on the mileage basis—

commonly referred to as the mileage prorate—should be modified to the extent that the relative cost of the service, i. e., the haul, is greater on one line than on the other.

In a division case, therefore, the record must disclose the amount and cost of the service rendered *under* the *joint rates* by the respective carriers party thereto. The Commission has so held time and again as will be seen by cases hereinafter cited. The proposition is elemental. No administrative body, without acting arbitrarily, can fairly decide the proper proportion due each carrier unless it is fully advised by the record as to what the respective divisions are and as to the *amount of service* that each performs and the *cost of service* of each of the carriers. This record does not disclose the amount of the service which the Orient, for example, performs *under its joint rates* with the Frisco. On the other hand, the record does not disclose either the amount or the cost of the service on the Frisco. The same is true as to other carriers.

It is true that there are some cost figures given on page 325 of the Commission's report (73 I. C. C. 319), but these cost figures relative to the cost to the respondents of their tonnage *as a whole* and they do not show the average cost of the service which they performed *under the divisions* of the joint rates with the Orient. Moreover, the cost figures given on

the same page as to the Orient Railroad deal with its traffic *as a whole*, local as well as joint. This record is entirely barren of any evidence as to the relative value, cost or amount of the respective services performed under the divisions. Besides nearly all the data on page 325 of the report was not introduced in evidence but was later taken from reports on file with the Commission. (See point III, supra.)

The Commission has held in the following cases that in a proceeding where the reasonableness of divisions are involved, the record must show the relative amount and cost of the service.

Pittsburgh & West Virginia Ry. Co. v. Pittsburgh & Lake Erie Ry. Co., 61 I. C. C. 272;
Louisville & Nashville Railroad Coal and Coke Rates, 50 I. C. C. 54, l. c. 57, 58;
Class Rates from Chestnut Ridge Railway stations, 50 I. C. C. 152, 153;
Federal Valley Railroad Co. v. Toledo & O. R. R. Co., 68 I. C. C. 499;
Wichita Falls & N. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 69 I. C. C. 68.

The Interstate Commerce Commission, in its brief herein, fully recognizes the force of the foregoing contentions of the appellees, but it seeks to avoid the effect thereof by arguing that there was evidence in the record from which the Commission could deduce what

the divisions were and the relative amount and cost of service. In so far as the hiatus in the proof by reason of the absence of any division sheets or the contents thereof, the Commission in its brief, page 41, referred to Exhibits Nos. 25 and 26, which show the tons, ton miles, total revenue and earnings per ton mile on all traffic interchanged between the Orient, on the one hand, and its immediate connections, on the other, during the year 1921. But the showing in these two exhibits cannot possibly disclose directly or by inference the contents of the several division sheets on the classes and the commodities interchanged for the following reasons:

First. The Commission, in its report, stated that it considered "*separately* the *several* divisions of interstate rates on freight *interchanged* between the Orient and *its* connections and having origin or destination on the Orient," and that after such consideration of the *several divisions*, it found that *each of them* was unreasonably high to the amount of the percentage indicated (73 I. C. C. 319, l. c. 327, 328). The information contained in Exhibits Nos. 25 and 26 does not in any way or in any manner show "the *several divisions* of interstate rates on *freight* interchanged between the Orient and its connections." A mere showing of the amount of the tonnage, the total revenue and the earnings per ton mile in an ordinary rate case does not establish what the rates are on the

various commodities carried any more than they establish what *the varying divisions are* on grain, coal, cotton, live stock and other classes of traffic.

Second. This case only involves the divisions under joint *interstate* rates, while the tons, ton miles, total earnings and earnings per ton mile shown in Exhibits Nos. 25 and 26 cover *all* freight traffic interchanged between the Orient and its connections, *intrastate* as well as interstate. They cannot possibly, therefore, show the divisions or the result of the divisions on *interstate* traffic.

Third. The record before the Commission in the New England Division case (66 I. C. C. 196, affirmed by this Court in 261 U. S. 184) showed as to all Class I railroads, individually and in the aggregate, the operating ratio, tons of freight, tons per mile of road, average receipts per ton, average receipts per ton mile, average haul (Exhibits Nos. 6, 16, 17, 20, 24, 28, 111, 112, 113, 114, 117, 125, 172, 173 therein); but the Commission nevertheless properly *held* that it would not fix divisions on traffic *as to which the divisions were not shown*. "Nor were divisions of the Bangor & Aroostook shown. Findings cannot be made with respect to any of these divisions" (66 I. C. C. 196, l. c. 200).

Fourth. Judge Kennedy, in his dissenting opinion

herein, when this case was before the court below, said (288 Fed. 102, l. c. 119):

> "It is admitted, however, by both sides to this controversy, that the per-ton-mile basis is not a fair one for sole use in determining divisions. So many different elements enter into the determination of cost of service that the ton mile should be considered only as one element."

Certainly an exhibit which shows the data from which the ton-mile earnings on the traffic *as a whole* may be deduced does not throw any light as to the reasonableness of the *several* divisions on *coal, grain, live stock, cotton and other commodities* carried under joint rates.

Fifth. In its brief the Interstate Commerce Commission argues that facts as to the *relative cost of service* were shown (pp. 43-45). It relies upon the table in the Commission's report. We have already shown herein elsewhere that *nearly all the data* shown in this table *was not introduced in evidence,* but was gleaned by the Commission from certain annual reports on file with it. The chain of proof necessary to sustain an order cannot be supplemented by facts *not of record* in the case.

The Attorney-General in his brief seeks, apparently, to convince the Court that it was not necessary to introduce division sheets because counsel for the Frisco

at the hearing before the Commission said that he did not care to know the "subdivisions between Chicago and El Paso" (Attorney-General's Brief, p. 20). The attorney representing the Frisco was not interested in the divisions between Chicago and El Paso, but was interested in the *divisions between the Orient and the Frisco.* The Frisco reaches neither El Paso nor Chicago. Certainly a casual remark of that kind as to divisions to which his railroad was not a party cannot be construed as an admission that the appellees waived the right to have such proof. No such point is made in the brief of the Interstate Commerce Commission herein. Furthermore, Exhibit No. 14, referred to by the Attorney-General, *does not show any division between the Orient* Railway on the one hand and the *immediate connections* on the other. It relates *solely* to transcontinental traffic.

V.

ORDER IS INVALID BECAUSE OF FAILURE TO JOIN AS DEFENDANTS OR RESPONDENTS OTHER CARRIERS WHO PARTICIPATED IN AND WHO WERE PARTIES TO THE SAME JOINT RATES.

The record discloses that only 39 carriers who were parties to joint rates with the Orient were made respondents or defendants in this case. The other

defendants who are parties to those same joint rates were not made parties to the proceeding. The names of the other carriers appear in Exhibit No. 24 (Rec., pp. 313-325).

Paragraph 4 of Section 1 of the Interstate Commerce Act reads as follows (41 Stat. L. 474):

> "It shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property * * * in case of joint rates, fares or charges, to establish just, reasonable and equitable divisions thereof as between the carriers subject to this act *participating therein* which shall not unduly prefer or prejudice *any* of such participating carriers."

Paragraph 6 of Section 15 of the Interstate Commerce Act reads as follows (41 Stat. L. 484):

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges applicable to the transportation of passengers or property are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the *carriers parties thereto* (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission *shall*, by order, prescribe the just, reasonable and equitable divisions thereof *to be received by the several carriers.*"

The foregoing statute provides that if the Commission is of the opinion that the division of joint rates is unjust, inequitable or unduly preferential or prejudicial as *between carriers thereto,* it shall by order prescribe just, reasonable and equitable divisions thereof to be received by the *several* carriers. The statute plainly contemplates that when the divisions of joint rates are attacked *all* the carriers who are parties to those joint rates must be made parties to the case so that the rights and interests of all may be fully and adequately protected.

All the carriers who are parties to joint through rates are necessarily interested in the divisions of those rates; for if one carrier, upon a complaint, is found to be entitled to an increase, then all the other carriers to those joint rates should be made parties so that the remainder of the revenue might be equitably divided between them.

On this question the Interstate Commerce Commission in its brief said (p. 51):

> "As to joint rates which extended beyond the lines of the Orient and its direct connections—that is to say, joint rates in which other railroads participated—the Commission did not change the divisions received by the other carriers, but considered and reapportioned only that part of the revenue which accrued jointly to the Orient and each of its direct connections for the part of the service which they jointly performed."

It is true that the Commission required the carriers directly connecting with the Orient to stand the whole burden of furnishing it operating expenses, but the point we are making now is that under the statute, all the carriers who are parties to the joint rates *must be made parties* defendants or respondents in the proceeding before the Commission. It may be that after they have been made parties, the Commission can decide that *only* the connecting carriers should contribute but *before proceeding with the case*, it is our contention that *all the carriers* who were parties to the joint rates should be before the Commission. *This was done in the New England case.*

Thirty-nine carriers were joined, twenty-six of whom do not directly connect with the Orient, but as shown in the record, there are scores of other carriers who participate in the same joint rates with the Orient and its immediate connections and who were not brought in as defendants or respondents. The statute plainly contemplates that they should.

A proceeding of this kind is similar to a case wherein a shipper is attempting to prove the unreasonableness of joint rates to which several carriers are parties. The Commission has frequently held that under such circumstances it is necessary for complainants *to join as defendant all the carriers who participate* in the movement of the traffic *under those joint rates.*

In Stevens Grocer Company et al. v. St. Louis, Iron Mountain & Southern Ry. Co. et al., 42 I. C. C. 396, 397, 399, the Commission said:

> "At the hearing defendant objected to the sufficiency of the complaint because the carriers parties to the movement east of Memphis were not named as defendants. Numerous cases were referred to by the parties as supporting their contentions that it is, or is not, proper and necessary to bring in issue the through rate or charge and to name the carriers parties thereto, *before attacking a portion of such through rate or charge*. In the past the procedure in this respect has been varied somewhat, dependent upon the circumstances of the cases. It is important that the true rule be definitely announced and that a uniform policy be established under which parties complainant and defendant may understand what is required. We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue *and the participating carriers named as such defendants*."

In McDavitt Bros. of Brownsville, Tex., et al., v. St. Louis, B. & M. Ry. Co. et al., 43 I. C. C. 695, the Commission declined to exercise jurisdiction for the reason that the complainant *did not join other carriers who were parties to the joint rates attacked*. The Commission said (696):

> "On the hearing it developed that the points to which complainants ship vegetables in bulk are

St. Louis and Kansas City, Missouri, Chicago, Illinois, and destinations east of the Mississippi River and north of the Ohio River. The connecting and delivering carriers beyond the State of Texas are parties to the tariff schedules containing the rates under attack. No complaint is made against those carriers, and they have not been heard. The complaint will, therefore, be dismissed, but without prejudice. An order will issue accordingly.[20]

The Board of Trade of the City of Chicago v. Illinois C. R. Co., 26 I. C. C. 585, 595, the Commission said:

> "Complainant asks that we establish just and reasonable rates from Omaha to Chicago on grain when for export, but neither the meager facts disclosed nor the scope of this complaint, to which but one interested carrier is a party defendant, afford justification for disturbing an adjustment which has been maintained for six years."[21]

In the case of Lehigh Portland Cement Co. v. Baltimore & O. S. W. R., 42 I. C. C. 406, the Commission found that lower rates on cement from Mitchell, Indiana, to Kentucky junctions than from Evansville, Kentucky, were clearly unfair to Evansville, but no order was entered by the Commission in that case for the reason that the Illinois Central was not made a party defendant.

In the case of J. Allen Smith & Co. v. Southern Ry. et al., 48 I. C. C. 647, the complaint attacked a rate on wheat from Chicago, Illinois, via New Albany, Indiana, to Knoxville, Tennessee, milled, the products reshipped to various points in Carolina territory, as unreasonable and discriminatory. No carrier operating from Chicago to New Albany was named as a party. The Commission held that it was powerless under these circumstances to make an order for the reason that necessary party had not been made defendant, and the complaint was dismissed.

In another case, a complainant attacked a rate on coal, ashes and cinders shipped from Coatesville, Pennsylvania, to Carney's Point, New Jersey, as unreasonable. The shipments originated at a plant located on the rails of the P. & R. Railway Co. in Coatesville, and were shipped by that carrier to a point of interchange with the Pennsylvania Railroad, a charge of 20 cents per ton being made for the service, which was absorbed by the Pennsylvania Railroad. The P. & R. Railway Company was not named a party defendant, nor was the switching charge assailed. The Commission held that under the facts the P. & R. Ry. Co. was a necessary party defendant, and as it was not joined, the Commission found it necessary to dismiss the complaint.

Du Pont de Nemours P. Co. v. Pennsylvania R., 43 I. C. C. 227.

In Cement Rates Between Points in Illinois and Points in Minnesota, 32 I. C. C. 369, it was alleged that the general system of rates was unduly discriminatory, but the Commission held that the question of undue discrimination was not before it, and that the determination of that question could only with propriety be made on a record where by the complaint the issue was raised and where *all the interested carriers were defendants.*

In Griffing v. Chicago & N. W. R., 25 I. C. C. 134, the Commission decided that it had jurisdiction to deal only with those carriers which are parties to the proceeding.

In Star Grain & Lbr. Co. et al. v. Atchison, T. & S. F et al., 14 I. C. C. 364, the Commission seems to have *specifically passed upon the question the defendants are raising in this case.* The Commission said (371):

> "The division here fixed is for the haul to Fort Worth from mill points on the rails of the Cotton Belt and its subsidiary line, the Eastern Texas Railroad Company, which is a party defendant hereto. But it is not to be understood as including any allowance to the so-called tap lines. These companies are not parties to this proceeding and for that reason no order affecting them, or fixing a rate for any services claimed to be performed by them, can properly be en-

tered. Moreover, even if they were parties to the complaint the record contains no testimony that would enable us intelligently to extend to them any portion of this division for the haul south of Fort Worth."

VI.

ORDER IS INVALID BECAUSE INCIDENTAL FACT OF PHYSICAL CONNECTION WITH ORIENT WAS MADE THE SOLE TEST IN DETERMINING WHO SHOULD CONTRIBUTE AND WHO SHOULD NOT CONTRIBUTE.

Appellees contend that if the Commission has the power to increase divisions of joint rates in order to pay the operating expenses of one carrier, then an order requiring the revenues to be transferred *solely* from those carriers who happen to have physical connection with the Orient, is arbitrary and unlawful.

Thirty-nine carriers were made respondents in the proceeding before the Commission. The Commission found that the divisions of thirteen of them were unlawful and ordered that they be depleted by certain percentages and that the amount so deducted be added to the divisions of the Orient. However, Exhibit No. 24 (Rec., pp. 313-325) shows that there are scores of carriers who are parties to the joint rates with the Orient and who were not required to decrease their divisions in order that the Orient may

have sufficient revenues to pay its operating expenses. For example, on intermediate traffic moving over the Orient System during the year 1921 the following carriers received the sums set opposite each from divisions under joint rates with the Orient System:

Arizona & Eastern	$27,926.73
Chicago, Burlington & Quincy	61,656.34
Chicago, Milwaukee & St. Paul	41,395.23
Chicago Great Western	14,488.11
Chicago & Northwestern	8,812.61
Chicago & Alton	20,590.83
El Paso & Southwestern	19,544.79
Pan Handle & Santa Fe	25,291.48
Pacific Electric	55,615.50
Wabash	53,124.30
International-Great Northern	40,807.50

Again, on traffic forwarded from the Orient during the year 1921 the following carriers who were parties to joint rates with the Orient received as divisions the following sums set opposite each:

Chicago, Burlington & Quincy	$13,474.55
Cisco & Northeastern	2,422.72
Colorado & Southern	4,135.99
Fort Worth & Rio Grande	11,001.20
Houston & Texas Central	5,532.59
Illinois Central	4,501.82
Kansas City Southern	3,337.62
Louisiana Railway & Navigation Company	8,214.29
Morgans Louisiana & Texas Railroad	9,462.36
Panhandle & Santa Fe	21,189.02

St. Louis Southwestern of Texas	4,156.41
San Antonio & Aransas Pass	3,956.86
Southern Pacific	23,334.50
Trinity & Brazos Valley	6,381.28
Wabash	5,910.38
Wichita Valley	6,058.35

On traffic received by the Orient under joint rates the following carriers received as divisions the sums set opposite each:

Chicago & Alton	$ 2,187.49
Chicago, Burlington & Quincy	8,116.79
Chicago, Milwaukee & St. Paul	7,173.69
Chicago, Rock Island & Gulf	10,026.27
Colorado Southern	70,779.81
Denver & Rio Grande	22,065.53
International-Great Northern	5,124.23
Kansas City Southern	10,721.54
Missouri, Kansas & Texas	17,445.86
Northwestern Pacific	7,085.08
Oregon W. R. R. & N.	5,636.88
Southern Pacific	136,956.23
Union Pacific	12,474.70
Wabash	4,501.80
Wichita Valley	11,105.34

The foregoing facts are shown in Exhibit No. 24 (Rec., pp. 313-325). None of the foregoing carriers were required to deplete their revenues under their divisions with the Orient Railway. It is manifestly unfair and arbitrary to require that the divisions of the connecting carriers *only* be depleted in order to

defray the operating expenses of the Orient Railway and we submit that the order is invalid on this ground alone.

For the foregoing reasons appellees respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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Frisco Bldg.,
St. Louis, Mo.
February 16, 1924.